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No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OFFICE OF THE CLERK

FIDEICOMISO DE LA TIERRA DEL CAÑO MARTÍN PEÑA,
Petitioner,

v.

LUIS G. FORTUÑO, ANTONIO M. SAGARDÍA-DE JESÚS, MUNICIPALITY OF SAN JUAN, JORGE SANTINI, AUTORIDAD DE ENERGÍA ELÉCTRICA, AUTORIDAD DE CARRETERAS, ADMINISTRACIÓN DE TERRENOS,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a well-pleaded claim that private property was taken in violation of the Takings Clause under the mere pretext of a public purpose may be dismissed at the pleading stage simply because the government can advance in litigation a *post hoc* public purpose that appears facially valid?

LIST OF PARTIES

Pursuant to Rule 14.1(b) and Rule 29.6, the following list identifies all the parties to the proceeding before the United States Court of Appeals for the First Circuit:

The Fideicomiso de la Tierra del Caño Martín Peña was the appellant below.

The appellees below were: Luis G. Fortuño, Governor of the Commonwealth of Puerto Rico; Antonio M. Sagardía-De Jesús, the Secretary of Justice of the Commonwealth of Puerto Rico; the Municipality of San Juan; Jorge Santini, the Mayor of the Municipality of San Juan; the Autoridad de Energía Eléctrica; the Autoridad de Carreteras; and the Administración de Terrenos.

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OPINIONS BELOW

The opinion of the First Circuit (Pet. App. 1a-34a) is reported at 604 F.3d 7. The order denying the petition for panel rehearing or rehearing *en banc* (Pet App. 55a-56a) is unreported. The opinion of the United States District Court for the District of Puerto Rico (Pet. App. 35a-54a) is reported at 670 F. Supp. 2d 132.

JURISDICTION

The Court of Appeals for the First Circuit issued its decision on April 28, 2010. On June 3, 2010, the First Circuit denied petitioner's timely filed petition for rehearing or rehearing *en banc*. Justice Breyer extended the time for filing a petition for certiorari to October 31, 2010. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATORY PROVISIONS INVOLVED

This case involves the following statutes and regulatory provisions, which are set forth in full in the Appendix to the Petition (Pet. App. 57a-147a): Puerto Rican Law 489 of September 24, 2004, and Puerto Rican Law 32 of June 23, 2009, which amends a particular article of Law 489.

STATEMENT OF THE CASE

A. Factual Background

Home to about 30,000 people, the Martín Peña Canal District runs through the heart of San Juan, Puerto Rico. The district's residents live on land formed by filling in the mangrove swamp on the banks of a canal formerly owned by the Commonwealth of Puerto Rico and the Municipality of San Juan. Spurred by a dredging project that would improve the environmental conditions of the canal but potentially displace local residents, the Puerto Rico Transportation and Public Works Department and the Puerto Rico Highways and Transportation Authority launched the Martín Peña Canal ENLACE Project. The project's goal was to "rehabilitate and revitalize this district, protecting the permanence of these communities" while "creating the conditions for integrating them into the urban fabric of the city, offering its residents a dignified life and the appropriate environmental conditions for fostering the rehabilitation of the San Juan Bay Estuary." Pet. App. 60a.

Local residents participated in over 700 community meetings to assist in the creation of a formal development plan for the district. The issue of land ownership was a significant concern during the process, and numerous options were evaluated. Consensus was eventually reached on a community land trust model, under which a private nonprofit entity would collectively own the land and residents would retain surface rights to the parcels on which they lived.

In September 2004, the development plan agreed upon by the community, including the land trust model of ownership, was adopted by the Puerto Rico Legislature as Law 489. Pet. App. 57a. The law provides for the creation of ENLACE, a public entity responsible for implementation of development initiatives, and Petitioner Fideicomiso de la Tierra del Caño Martín Peña ("the Fideicomiso"), a private entity to act as collective landowner on behalf of the district's residents. Law 489 gives the Fideicomiso independent judicial personality and the power to own and acquire land. Under Article 16 of Law 489, public title to lands in the Martín Peña Canal District was transferred to ENLACE by operation of law 160 days after the date of Law 489's enactment. Article 19 empowers the Fideicomiso to acquire land transferred to ENLACE by operation of Article 16.

The Fideicomiso was formally constituted in late 2008 with the enactment of a general regulation governing its operation. By June 2009, it had properly acquired title to more than 200 acres of formerly public land.

On June 18, 2009, soon after a general election in which the New Progressive Party won control of the governorship and increased its majorities in both chambers of the Legislature, the Puerto Rico Legislature passed Law 32 "to amend Article 16 of Law Number 489 of September 24, 2004." Pet. App. 135a. The bill was signed into law on June 23, 2009. Law 32 explicitly provides that any land owned by the Fideicomiso but formerly owned by either the Municipality of San Juan or the Commonwealth of Puerto Rico will revert back to its original owner.

The law also requires that the Municipality, in conjunction with the Commonwealth, undertake the procedures and title studies necessary should the land be transferred to individual owners. The "Statement of Motives" set forth in Law 32 indicates that the law's purpose is "to conform the provisions of Section 16 of Act No. 489 to other laws of which the purposes are also matters of high public interest," and "to suppress the reference made to public domain properties, since these are not liable to being privately owned." Pet. App. 136a.

B. Procedural History

On June 25, 2009, Petitioner sued Respondents in the United States District Court for the District of Puerto Rico, seeking emergency injunctive relief from the effects of Law 32, as well as a declaratory judgment and a permanent injunction. The request for immediate relief was motivated by a public announcement by the Mayor of San Juan that, despite Law 32's statement that "public domain properties . . . are not liable to being privately owned," Pet. App. 136a, he intended to begin transferring the land to private individuals as soon as possible. The district court denied the request for emergency relief on June 29, 2009, and requested additional briefing on Petitioner's ability to own land and the issue of *Pullman* abstention. Petitioner filed an urgent motion later that day in an attempt to stop the Mayor from giving the Fideicomiso's land to private parties, a process which, according to local newspapers, he had already begun on Sunday, June 28, 2009. Pl.'s Mot. at 8, Civil No. 2009-1581 (D.P.R. June 29, 2009). In its motion, Petitioner showed that

it had been unambiguously granted independent judicial personality and the ability to acquire and own land under Puerto Rican law, making *Pullman* abstention inappropriate. On July 2, 2009, the district court denied Petitioner's second motion without explanation.

Petitioner appealed to the First Circuit on July 6, 2009. In their brief, Respondents emphasized that "elections have consequences" and that "Law 32 merely reflects representative democracy at work." Appellees' Br. at 73, No. 09-1911 (1st Cir. Aug. 31, 2009). Completely ignoring Law 32's statement that "public domain properties . . . are not liable to being privately owned," Pet. App. 136a, Respondents asserted that they were merely changing the means by which the goals of Law 489 would be achieved. They argued that a shift "from collective holding of the land to individual holdings of the land" was desirable because "empowering the individual will furnish economic and community development which yields better results." Appellees' Br. at 78, No. 09-1911. The First Circuit dismissed Petitioner's appeal without prejudice on September 17, 2009, on the ground that the district court had ruled only on the application for emergency relief and not on the request for a preliminary injunction. On November 10, 2009, the district court dismissed the case on the grounds of *Pullman* abstention and denied the preliminary injunction motion as moot. Pet. App. 35a.

Petitioner once again appealed to the First Circuit. This time, Respondents turned abruptly away from their previous emphasis on the benefits of

transferring Petitioner's land to private owners. They instead portrayed Law 32 as nothing more than a transfer of land from the Fideicomiso to other government entities better able to carry out community redevelopment due to "their many programs, services, initiatives and funds." Appellees' Br. at 103, No. 09-2569 (1st Cir. Feb. 18, 2010). Respondents stated that Law 32's enacted purpose "to suppress the reference to public domain properties, since these are not liable to being privately owned," was intended only as "a *de minimis* addition to merely emphasize that lands destined to the public domain, i.e. destined for public infrastructure or development projects, inter alia, cannot be privatized under any circumstances." *Id.* at 102 n.49.

On April 28, 2010, the First Circuit ordered that the case be dismissed with prejudice. Pet App. 1a. The court held that Petitioner had sufficient interest in the land in question to establish injury, and that *Pullman* abstention was not appropriate because Petitioner's claims could be resolved without regard to questions of Puerto Rican law. The court went on to hold that Law 32 took Petitioner's land in service of a satisfactory public purpose. It held that because Law 32 amended one article of Law 489, it was simply a different means to achieve the valid public purposes articulated by Law 489. It also emphasized that Law 32 itself undoubtedly fulfilled a public purpose because it transferred lands to public ownership, stating that "a federal court cannot conclude Law 32 was an illegitimate means of advancing a public purpose, not least because

transfers of private property to public ownership have been upheld since the founding of our country." Pet. App. 23a.

Ignoring this Court's explicit acknowledgement in *Kelo v. City of New London*, 545 U.S. 469 (2005), that the state may not take property under the pretext of a public use when its actual purpose is to bestow a private benefit, the First Circuit gave no weight to Petitioner's showing that the Respondents have continually shifted their explanation of how Law 32 meets the public use requirement and have both identified the private parties to whom they actually intended to give Petitioner's land and begun the process of transferring it. Instead, that court relied on Respondents' articulation of a new conceivable public purpose for Law 32 at oral argument, which purports to justify the taking on the ground that Petitioner has failed to make sufficient progress toward local redevelopment. This rationale, which Petitioner disputes, is the last in a series of unsatisfying justifications for Law 32 that Respondents have alternately embraced and disclaimed in order to present a pretextual "public purpose" that will allow them to take Petitioner's property for the benefit of private parties.

REASONS FOR GRANTING THE PETITION

In *Kelo v. City of New London*, 545 U.S. 469 (2005), this Court recognized that the Takings Clause protects property owners from takings "under the mere pretext of a public purpose." 545 U.S. at 478. In this case, the Fideicomiso made specific allegations that the Commonwealth of Puerto Rico

took its land without a legitimate public purpose and under the mere pretext of a public purpose. As part of a comprehensive, years-long development plan, the Fideicomiso – a private land trust – had obtained two hundred acres of land surrounding the Martín Peña Canal. Then a new political party took power and decided that it no longer wanted the Fideicomiso to own the land. The Commonwealth thus confiscated the Fideicomiso's land by statute. The Commonwealth's stated reasons for the taking are nearly incomprehensible, and have been rightly disclaimed in part by Respondents.

Upon the enactment of the challenged statute, the Mayor of San Juan, whose city was to obtain a substantial portion of the Fideicomiso's land, declared that he would start distributing the land to private parties as soon as possible. Respondents provided the courts below with conflicting and implausible reasons for the taking. Nevertheless, in reliance on the government's supposedly public purpose – demonstrably invented after the fact – the First Circuit ordered the Fideicomiso's complaint be dismissed.

This refusal to allow the Fideicomiso the opportunity to pursue its well-pleaded claim is in direct conflict with this Court's decision in *Kelo* and is inconsistent with the interpretation of *Kelo* by the highest courts of Hawaii and the District of Columbia. The First Circuit's error is also symptomatic of considerable confusion in the lower courts regarding the proper application of the pretext inquiry endorsed by *Kelo*.

By dismissing petitioner's pretext claim at the pleading stage on the sole ground that Respondents eventually came forward with a facially valid public purpose, the Court of Appeals effectively foreclosed any plaintiff in the First Circuit from pursuing a pretext claim. In the process, the Circuit deprived the Fideicomiso of the opportunity to litigate its well-pleaded constitutional challenge to the taking of the land it held in trust for some of Puerto Rico's most vulnerable citizens.

I. The First Circuit's Decision Conflicts With This Court's Decision In *Kelo* And With Decisions Of The Highest Courts Of The District Of Columbia And Hawaii

1. This Court has taught that a government may not take property "under the mere pretext of a public purpose." *Kelo*, 545 U.S. at 478. This is because a taking that "serve[s] no legitimate purpose of government . . . would . . . be void," *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984), and because "[i]t is well established that . . . the question [of] what is a public use is a judicial one," *City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930). Thus, the starting point for a court's analysis of a takings claim is, as both *Kelo* and *Vester* described it, the "actual purpose" of the taking. *Kelo*, 545 U.S. at 478; *Vester*, 281 U.S. at 446. "When the legislature's purpose is legitimate and its means are not irrational, [this Court's] cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts." *Midkiff*, 467 U.S. at 242-43; *accord Berman v. Parker*, 348 U.S. 26, 33 (1954) ("[T]he means of executing the

project are for Congress and Congress alone to determine, once the public purpose has been established.").

In *Kelo*, this Court explained that New London would not have been permitted to take petitioners' land if the city's "actual purpose was to bestow a private benefit." 545 U.S. at 478. As Justice Kennedy explained in his concurrence, "transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual benefits, are forbidden by the Public Use Clause." *Id.* at 490 (Kennedy, J. concurring). The Connecticut courts had concluded, and this Court agreed, however, that in *Kelo* "there was no evidence of an illegitimate purpose." *Id.* at 478. Rather, the record before this Court, developed by a seven-day bench trial in state court, demonstrated that the plan was not intended to benefit a private entity, but to improve the local economy. *Id.* at 478 n.6; *see also id.* at 492 (Kennedy, J., concurring) (relying on trial court's finding that primary purpose of the taking was economic development rather than a desire to benefit private parties). And, indeed, the development plan before the Court in *Kelo* was "comprehensive [in] character" and the product of "thorough deliberation." *Id.* at 484. The taking in *Kelo* "occurred in the context of a comprehensive development plan meant to address a serious citywide depression." *Id.* at 493 (Kennedy, J., concurring). Further, "[t]he city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes." *Id.*

The Court explained, however, that an "unusual exercise of government power" – like the taking of one citizen's property to be transferred to another for the sole purpose of collecting increased tax revenues due to the second citizen's more productive use – "would certainly raise a suspicion that a private purpose was afoot." *Id.* at 487. Citing *Vester*, 281 U.S. at 448, the Court further noted that "[c]ourts have viewed such aberrations with a skeptical eye." *Id.* at 487 n.17; *see also id.* at 493 (Kennedy, J. concurring) (suggesting that where "the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible" a presumption of an impermissible motive might be warranted).

The aberration presented in *Vester* was the Cincinnati city council's failure to identify in any but "the most general terms" the purpose for the condemnation of land adjacent to a street-widening project. 281 U.S. at 443. The *Vester* Court thus found itself asked either to "assume that whatever the city, entirely uncontrolled by any specific statement of its purpose, may decide to do with the properties appropriated, will be valid under both the state and Federal Constitutions," or to choose a potential purpose "and decide for or against the taking accordingly, although the assumption may be found to be foreign to the actual purpose of the appropriation as ultimately disclosed and the appropriation may thus be sustained or defeated through a misconception of fact." *Id.* at 446. The Court rejected both possibilities, instead resting its decision on the conclusion that the taking violated

Ohio law because it failed to define the purpose of the condemnation, and holding that "[q]uestions relating to the constitutional validity of an excess condemnation should not be determined upon conjecture as to the contemplated purpose." *Id.* at 449.

As in other areas of the law, then, proof that the government's stated reason for a taking is pretextual supports a finding that the taking lacked a legitimate public purpose. *Cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."); *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997) (Kennedy, J., concurring) ("If the object or purpose of the Kansas law had been to provide treatment but the treatment provisions were adopted as a sham or mere pretext, there would have been an indication of the forbidden purpose to punish."). Indeed, the government's assertion of a reason for the taking other than the true one can be very persuasive proof that the government acted for an impermissible non-public purpose. *Cf. Reeves*, 530 U.S. at 147 ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.").

2. In this case, however, the First Circuit adopted the rule that even well-pleaded allegations of pretext are insufficient to avoid dismissal so long as the government presents a facially valid public purpose

in the course of the litigation. The Fideicomiso clearly alleged that the reasons given by Respondents for the taking of the Fideicomiso's land cannot be believed, and raised a plausible claim that an illegitimate non-public purpose was afoot. Without even addressing the Fideicomiso's allegations, the Circuit held that the bare fact that Respondents put forth a facially valid public purpose for the taking required dismissal of the Fideicomiso's complaint. The First Circuit's rule prevents private parties like the Fideicomiso from vindicating their right to not have their land taken under the mere pretext of a public purpose.

The Fideicomiso's well-pleaded allegations demonstrate that the Legislature's contemporaneous statement of purpose for confiscating the Fideicomiso's land – which was incorporated by reference in the Fideicomiso's complaint – makes little sense, and has since been disclaimed in part by Respondents. The preamble and statutory statement of motives for Law 32 set forth two reasons for the taking: (1) "to conform the provisions of Section 16 of Act No. 489 to other laws of which the purposes are also matters of high public interest," and (2) "to clarify that public domain lands shall not be transferable" and "to suppress the reference made to public domain properties, since these are not liable to being privately owned." Pet. App. 136a. On appeal, Respondents disclaimed reliance on the second stated purpose. Respondents have never been able to explain what the first stated purpose means.

Whatever it means to harmonize Section 16 of Law 489 with "other laws of which the purposes are

also matters of high public interest," the Fideicomiso alleged a critical fact that raises a plausible inference that the Legislature lacked a legitimate public purpose: that the Mayor of San Juan, to whose city a substantial portion of the land confiscated from the Fideicomiso would revert, immediately "appeared publicly declaring that his intention is to provide land titles to private individuals." Compl. ¶ 4.35. The Fideicomiso alleged further that "the Municipality of San Juan has sent vehicles to the area with speakers exhorting citizens to communicate with a Municipal agency in order to [accelerate] the process."[1] *Id.*

For a time during this litigation, Respondents embraced the Mayor's land give-away as the public purpose animating the taking of the Fideicomiso's land. But by the time the case was presented on the merits to the First Circuit, Respondents had abandoned this reason too. Rather, on appeal, Respondents argued that the purpose of the taking was to kick-start economic development and environmental rehabilitation by giving the land back to experienced government agencies.

The hypothetical public purpose posited by Respondents' counsel is neither consistent with the facts alleged by the Fideicomiso – namely, that the stated intention of the Mayor was not to pursue public development of the land, but to give the land away to private parties as quickly as possible – nor

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[1] Indeed, within days of this announcement, a local newspaper reported that the Mayor had, in fact, already begun handing over property titles to private citizens. Pl.'s Mot. at 8, Civil No. 2009-1581 (D.P.R. June 29, 2009).

entitled to any sort of judicial deference. *See 99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1130 (C.D. Cal. 2001) ("The idea of future blight simply embodies Lancaster's current litigation position; it is not supported by any evidence in the record. Accordingly, the Court need not defer to Lancaster's belated statement of public use."), *cited in Kelo*, 545 U.S. at 487 n.17; *Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996) (en banc) (observing that if governments could take property without a stated purpose and then "later justify their decisions in court merely by positing 'a conceivable public purpose' to which the taking is rationally related, the 'public use' provision of the Takings Clause would lose all power to restrain government takings."), *overruled on other grounds by, Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

The Fideicomiso alleged additionally that, in contrast to the careful planning and cooperative procedure by which the Fideicomiso obtained and managed its land, the taking effected by Law 32 was the product of "no discernible plan." Compl. ¶ 1.4. The Commonwealth's failure to develop any plan – let alone a comprehensive or considered one – provides further strong evidence that the taking lacked a legitimate public purpose. *See Kelo*, 545 U.S. at 478 (explaining that New London's taking was not pretextual in part because the taking was to be "executed pursuant to a carefully considered development plan" (internal quotation marks omitted)); *Western Seafood Co. v. United States*, 202 F. App'x 670, 675 (5th Cir. 2006) ("As in *Kelo*, the

City of Freeport seeks to develop its waterfront to revitalize a flagging local economy. The proposed taking of Western Seafood's property is the result of a carefully considered development plan."); *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 338 (Pa. 2007) ("Moreover, the United States Supreme Court placed great weight upon the existence of a 'carefully considered' development plan in order to rule that the taking in *Kelo* . . . was not pretextual, but for a proper purpose." (internal quotation marks omitted)).

Notwithstanding the Fideicomiso's substantial showing of pretext, the First Circuit's opinion disregarded this Court's decision in *Kelo* in according dispositive weight to Respondents' *post hoc* recitation of a conceivable public purpose. The First Circuit did not analyze the strength of the Fideicomiso's pretext claim. It did not address the Fideicomiso's allegations that the Mayor of San Juan publicly announced that once the city obtained the Fideicomiso's land, it would give the land away to private parties. Instead, the Court of Appeals took at face value Respondents' claim that the purpose of the taking was to have "public agencies . . . hold and administer the lands in the canal area." Pet. App. 22a. Under *Kelo*, the court should not have treated Respondents' incantation of a conceivable public purpose as dispositive in the face of the Fideicomiso's well-pleaded pretext claim. Although the First Circuit recognized that the Fideicomiso's claims that the taking at issue here "serves no legitimate purpose" were "serious arguments," the court departed from *Kelo* by holding that the Fideicomiso's

pretext allegations were "not grounds for a claim under the Takings Clause." Pet. App. 21a.

At the pleading stage, the court was bound to credit the Fideicomiso's non-conclusory factual allegations. Indeed, the standard for the dismissal of a takings claim under the Public Use Clause is the same as the dismissal standard in any other case: the plaintiff must allege facts that if true state a "plausible" claim that the taking lacked a legitimate public purpose. *Compare Kelo*, 545 U.S. at 491 (Kennedy, J. concurring) ("A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose."), *with Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face." (internal quotation marks omitted)). Thus, because the government cannot take property under the mere pretext of a public purpose, a court may not dismiss a takings claim that raises a plausible allegation of pretext.

3. The D.C. Court of Appeals and the Hawaii Supreme Court have properly recognized the governing principles laid out in *Kelo*, and the First Circuit decision is therefore also in conflict with the decisions of those courts.[2] As the D.C. Court of

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[2] This conflict is particularly significant given the leading role that state courts play in adjudicating takings claims. *See*

Appeals explained in *Franco v. National Capitol Revitalization Corp.*, 930 A.2d 160 (D.C. 2007), a thoughtful opinion applying *Kelo* at the pleading stage, "*Kelo* recognized that there may be situations where a court should not take at face value what the legislature has said." *Id.* at 169; *accord County of Hawai'i v. C&J Coupe Family Ltd. P'ship*, 198 P.3d 615, 644 (Haw. 2008) (holding that *Kelo* "make[s] it apparent that, although the government's stated public purpose is subject to prima facie acceptance, it need not be taken at face value where there is evidence that the stated purpose might be pretextual"). The *Franco* court explained that "the government will rarely acknowledge that it is acting for a forbidden reason, so a property owner must in some circumstances be allowed to allege and to demonstrate that the stated public purpose for the condemnation is pretextual." 930 A.2d at 169.

The First Circuit decision cannot be reconciled with these two decisions or with *Kelo* itself. The Fideicomiso may not ultimately succeed in proving that the taking of its land was without a legitimate public purpose, but under *Kelo* it should have been given the chance to try.

William A. Fletcher, Keynote Address, Kelo, Lingle, *and* San Remo Hotel: *Takings Law Now Belongs to the States*, 46 SANTA CLARA L. REV. 767, 776-78 (2006) (explaining that effect of recent takings cases is to transfer substantial authority over takings issues to state officials and state courts).

II. The First Circuit's Refusal To Allow Petitioner To Pursue Its Pretext Claims Is Symptomatic Of General Confusion Among The Lower Courts As To How To Adjudicate Pretext Claims In The Wake Of *Kelo*

Although *Kelo* made clear that the government may not take private property on the mere pretext of a public purpose, *Kelo* did not, of course, involve a viable pretext claim. Nor did *Kelo* define the term "mere pretext." *See Goldstein v. Pataki*, 488 F. Supp. 2d 254, 288 (E.D.N.Y. 2007) ("Although *Kelo* held that merely pretextual purposes do not satisfy the public use requirement, the *Kelo* majority did not define the term 'mere pretext' . . . ."), *aff'd*, 516 F.3d 50 (2d Cir. 2008); *Franco*, 930 A.2d at 173 (observing that "the Supreme Court has not clarified the meaning of 'pretext'"). As a result, "[t]he decisions of the lower courts view [the] Court's opinion [in *Kelo*] through vastly different lenses, and no consensus has emerged about how to apply the Court's rules about pretext or comprehensive taking plans." Robert H. Thomas, *Recent Developments in Public Use and Pretext in Eminent Domain*, 41 URB. LAW. 563, 577 (2009); *accord* Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173, 184-85 (2009) (surveying cases and observing that "[t]he current test for identifying whether a taking is 'pretextual' is less than clear").

In particular, a number of courts have questioned whether the concurrence in *Kelo* sets forth a standard for litigating pretext claims that is different from the standard contemplated by the majority

opinion. *Compare Goldstein v. Pataki*, 516 F.3d 50, 64 n.10 (2d Cir. 2008) ("[E]ven assuming, *arguendo*, we were to apply a version of Justice Kennedy's standard here, we would scrutinize objectively and find no 'plausible' accusations of favoritism."), *Western Seafood Co.*, 202 F. App'x at 675 (declining to resolve whether the "heightened standard" of scrutiny appellant perceived in Justice Kennedy's concurrence "is necessary in certain cases"), *and C&J Coupe*, 198 P.3d at 641-42 (Haw. 2008) ("declin[ing] to adopt Justice Kennedy's concurring opinion"), *with Carole Media LLC v. New Jersey Transit Corp.*, 550 F.3d 302, 311 (3d Cir. 2008) (treating Justice Kennedy's concurrence as an elaboration of the pretext inquiry referred to by the majority opinion). In *Franco*, the D.C. Court of Appeals observed that while the concurring opinion was not binding, it "may accurately predict what the Court will hold when the record before it does not resolve the pretext issue." 930 A.2d at 169 n.8.

Similarly, the lower courts have disagreed as to whether pretext claims may be brought only to challenge economic development takings. The Second Circuit has suggested that judicial scrutiny of the purported purpose of a taking is appropriate only where the "*sole* ground asserted for the taking [is] economic development." *Goldstein*, 516 F.3d at 64 n.10. The Hawaii Supreme Court, by contrast, held that it was "[p]lainly . . . not the intention . . . of the Supreme Court in *Kelo* to foreclose the possibility of pretext arguments merely because the stated purpose is a 'classic' one." *C&J Coupe*, 198 P.3d at 647. While recognizing that in the case of a classic

public use the "character of the proposed public use" could be strong evidence in "favor of the presumption of [the taking's] validity," *id.* at 643 n.32, the Hawaii Supreme Court held that under *Kelo* a claim of pretext could prevail "even where the government's stated purpose is a 'classic' one," *id.* at 648.

The First Circuit's rule that the existence of a facially valid public purpose requires dismissal of a takings complaint without regard to well-pleaded allegations of pretext is an extreme example of the more general confusion and uncertainty courts and commentators have encountered in attempting to apply the *Kelo* rule forbidding takings under the mere pretext of a public purpose. Despite widespread recognition – outside of the First Circuit – of the viability of pretext claims under *Kelo*, courts have divided on the nature of the pretext inquiry and the breadth of its applicability. This Court's guidance is necessary to safeguard private property rights and to ensure that clear, consistent rules are developed to govern the adjudication of pretext claims.

III. If Undisturbed, The First Circuit's Decision Will Effectively Foreclose All Future Pretext Claims And Will Dispossess A Community Land Trust Representing Some Of Puerto Rico's Most Vulnerable Citizens

Allowing the First Circuit's decision to remain in force will permit the taking of private property without any scrutiny of the taking's stated purpose. By treating Respondents' *post hoc* incantation of a public purpose as dispositive, the First Circuit

effectively foreclosed any claimant from bringing any pretext claim under any circumstances. The essence of a pretext claim is that the stated reasons for the taking are unworthy of credence. However, under the rule established by the First Circuit, the bare fact that the government can present a facially valid public purpose as part of its argument in litigation is sufficient for dismissal at the pleading stage, notwithstanding well-pleaded allegations that the purpose is a pretext. According to the First Circuit's decision, so long as attorneys representing the government can supply – after the fact – a conceivable public purpose, takings will proceed without scrutiny of the government's "actual" purpose.

In this case, the First Circuit's dismissal of Petitioner's properly raised takings claim will dispossess a community land trust representing the interests of some of Puerto Rico's least powerful citizens. The continued existence of the Fideicomiso land trust is of significant public interest and importance in Puerto Rico. It represents the culmination of years of collaboration between citizens and their government to address an issue central to community revitalization and environmental protection. The residents of the Martín Peña Canal District invested substantial time in working with government agencies to create a plan for collective land ownership that would foster community development without the risk of displacement. Law 32 destroys the careful balance struck by this process and eliminates the land ownership solution at the heart of the resulting

formal development plan. The First Circuit's decision denies Petitioner the right – recognized by this Court in *Kelo* – to protect itself against this arbitrary exercise of government power by proving that its land was taken under the mere pretext of a public purpose.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1, 2010

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Appendix A

United States Court of Appeals
For the First Circuit

No. 09-2569

FIDEICOMISO DE LA TIERRA DEL CANO MARTIN PENA,

Plaintiff, Appellant,

v.

LUIS G. FORTUNO, in his official capacity as Governor of the Commonwealth of Puerto Rico; ANTONIO M. SAGARDIA-DE JESUS, in his official capacity as Secretary of Justice of the Commonwealth of Puerto Rico; MUNICIPALITY OF SAN JUAN; JORGE SANTINI in his official capacity as the Mayor of the Municipality of San Juan; AUTORIDAD DE ENERGIA ELECTRICA; AUTORIDAD DE CARRETERAS; and ADMINISTRACION DE TERRENOS,

Defendants, Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Francisco A. Besosa,
U.S. District Judge]

Before

Lynch, *Chief Judge*,
Torruella and Lipez, *Circuit Judges*.

Judith Berkan, with whom *Mary Jo Méndez*, *Berkan/Méndez*, *Pedro J. Saade*, and the *Clinica de Asistencia Legal Escuela de Derecho, Universidad de Puerto Rico*, were on brief for appellant.

Eliezer Aldarondo-Ortiz, with whom *Eliezer A. Aldarondo-López*, *Aldarondo & López Bras*, *Guillermo Somoza-Colombani*, Attorney General, *Mercado & Soto Law Offices*, *Maymi, Rivera & Rotger, P.S.C.*, *Anqel Rotger Sabat*, and *Francisco J. Amundaray* were on brief for appellees.

April 28, 2010

LYNCH, ***Chief Judge***. Plaintiff, Fideicomiso de la Tierra del Caño Martin Peña (Land Trust of the Martin Peña Canal, hereinafter "Fideicomiso"), an entity created by legislation, brings an unusual Takings Clause claim. The Fideicomiso does not attack the exercise of government condemnation or eminent domain powers. Rather, the challenge is to Law 32, a legislative amendment to an earlier statute enacted in 2004. That earlier statute is Law

489, which the Fideicomiso correctly admits serves a number of public purposes and which created the Fideicomiso. Law 489 was implemented by, inter alia, transferring to the Fideicomiso title to certain lands that had originally belonged to public agencies of the Commonwealth of Puerto Rico and the Municipality of San Juan when Law 489 was enacted. Law 32 revoked the Fideicomiso's title to those lands and returned title to those Commonwealth and municipal public agencies.

The essence of the Fideicomiso's claim is that if it is stripped of title to these lands and public agencies are reinvested with title, those agencies cannot be trusted to carry out the public purposes embodied in Law 489. The Fideicomiso styles this as a claim that the transfer of lands back to public agencies does not meet the "public use" requirement of the Takings Clause.

We order dismissal of the complaint.

In 2004, Puerto Rico enacted Law 489, the Martin Peña Canal Special Planning District Integrated Development Act. *See* P.R. Laws Ann. tit. 23, § 5031-5066. Law 489's stated public purpose is "to give priority attention to the environmental restoration of the Martin Peña Canal and to rehabilitate and revitalize the communities along its north and south banks" and to thereby "promote a healthy relationship between the natural environment and its surrounding city and communities, with a vision of integrated

development based on community empowerment." *Id.* § 5032.

The more specific purposes of the Martin Peña Canal ENLACE (LIAISON) Project, as embodied in Law 489, include:

> *Environmental.* To enable the rehabilitation of the San Juan Bay Estuary, improve the quality of its waters and the habitat of its fauna and wildlife by broadening and dredging of the Martin Peña Canal and a conservation strip along both banks thereof.
>
> *Socio-economic.* To improve the living conditions of the approximately thirty thousand (30,000) residents of the eight communities located along both sides of the Canal in the areas of public sanitation, housing, ordinance and quality of the urban spaces and the infrastructure.

Id. These stated purposes make it clear that one of the explicit intentions of the Martin Peña ENLACE Project is to remove conditions harmful to the public. Another explicit intention of the project is "to foster an integrated community development spearheaded by the members of the communities themselves." *Id.*

To implement these policy goals, Law 489 created two entities, the Martin Peña ENLACE Project Corporation ("Corporation"), *id.* § 5033, and

the Fideicomiso, *id.* § 5048. The Fideicomiso, as a land trust, was charged with administering and developing certain lands in the canal area for the benefit of the communities there. *Id.* One of its key goals was "[t]o contribute toward the solution of the ownership rights problem of many District residents through collective land-holding." *Id.*

The Corporation's mandate made it "responsible for coordinating the implementation of all aspects of the ENLACE Project; including . . . housing development, infrastructure, the dredging and canalization of the Canal, as well as urban and socioeconomic development," and "[t]o guarantee mechanisms for citizen participation in the planning and execution of the ENLACE Project and promote community empowerment." *See id.* § 5033.

Toward those ends, Law 489 provided that title to any lands in the canal area owned by the Commonwealth of Puerto Rico and the Municipality of San Juan would automatically transfer to the Corporation 160 days after the act became effective. *Id.* § 5045.[1] The Corporation would then transfer these lands to the Fideicomiso after regulations governing the Fideicomiso's operations were established. *Id.* §§ 5046, 5048. Those regulations were promulgated on October 21, 2008. *See* General

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[1] There was an exception for a maritime terrestrial zone, *id.* § 5045. Further, the Department of Housing was directed to do title searches and, where appropriate, to provide registration of ownership rights to residents of the area within one year. *Id.* § 5047.

Regulations for the Operation of the Caño Martin Peña Land Trust (hereinafter "Land Trust Regulations"). The land transfer to the Fideicomiso was completed with a formal deed on May 14, 2009, nearly five years after Law 489 was enacted.

One month later, on June 18, 2009, Puerto Rico enacted Law 32, a law which retroactively revoked only article 16 of Law 489, the article which had provided for the transfer of lands from the Commonwealth and Municipality to the Corporation and ultimately to the Fideicomiso. *See* Act of June 23, 2009, No. 32. Under Law 32, title to those lands was to revert back to the Commonwealth and Municipality immediately. *Id.* art. 1. Law 32's stated purpose was "[t]o amend Article 16 of Act No. 489 . . . to make viable that its provisions be harmonized with other laws, and to clarify that public domain lands are not transferrable." *Id.* pmbl. Most pertinent to this case are these provisions:

> Should the Corporation or the Fideicomiso, by virtue of the Act, have attempted to or have registered any Municipal property to its name, the same is by the present revoked and without effect and the title will immediately revert to the Municipality of San Juan.
>
> The properties of the Commonwealth of Puerto Rico will be studied and evaluated by its title holding

> dependencies to determine if these remain titled to the agency....
>
> Any of these properties which have been transferred to the Corporation or Fideicomiso will revert to the original Agency or Titleholder in order to follow the legal process previously mentioned.

Id. art. 1. The only lands the Corporation transferred to the Fideicomiso came from the public agencies of the Commonwealth and Municipality. Accordingly, the provision as to the reversion to the original titleholder is inapplicable. Law 32 does provide that public agencies may, under certain conditions, transfer title to lands in the canal district to the Corporation. *Id.*

Two days after Law 32's enactment, the Fideicomiso brought a civil rights suit in the federal district court of Puerto Rico against various entities and officials of the Commonwealth and the Municipality. The Fideicomiso primarily seeks to invalidate Law 32 under the Takings Clause, though it also makes claims under the Due Process Clause, the Contracts Clause, and the Ex Post Facto Clause of the United States Constitution.[2] Implementation of Law 32 has been stayed by this court in order to maintain the status quo while the constitutional issues are addressed.

---

[2] The Fideicomiso also challenges Law 32 under the parallel due process and takings clauses of the Puerto Rican constitution.

The Takings Clause of the Fifth Amendment applies to the states and to Puerto Rico through the Fourteenth Amendment. *See Tenoco Oil Co., Inc.* v. *Dep't of Consumer Affairs*, 876 F.2d 1013, 1017 n. 9 (1st Cir. 1989). The Takings Clause sets two conditions on the government's constitutional authority to take private property: the government may take private property for "public use," but it must provide just compensation when it does so. U.S. Const. amend. V.

The Fideicomiso says that Puerto Rico lacks authority to retake title to property recently transferred to the Fideicomiso, and that the federal courts should enjoin defendants from implementing Law 32 to do so, because any taking would not be for "public use."[3] It does not seek just compensation.

I. Facts

The events leading up to Law 32's enactment are undisputed.

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[3] The district court did not reach the merits of this claim because it declined to exercise jurisdiction over the Fideicomiso's claims under the abstention doctrine of *R.R. Comm'n of Tex.* v. *Pullman*, 312 U.S. 496 (1941). *See Fideicomiso de la Tierra del Caño Martin Peña* v. *Fortuño*, 670 F. Supp. 2d 132, 140-42 (D.P.R. 2009). It reasoned that whether the Fideicomiso owned "private property" subject to the Takings Clause turned on difficult and unsettled questions of Puerto Rican law best left to the Puerto Rican courts. *Id.* at 137-40. Our approach is to ask questions preceding the ones on which that court focused.

For centuries, water from the San Jose Lagoon emptied into the ocean by way of the Martin Peña Canal, a shallow, narrow, three-mile-long channel surrounded by mangrove swamps that runs through the heart of the city of San Juan.

Until the mid-twentieth century, the area around the canal was unsettled and undeveloped. The Great Depression hit Puerto Rico's agricultural economy especially hard, and Hurricanes San Felipe and San Ciprian, two of the worst in Puerto Rican history, destroyed agricultural production and left hundreds of thousands of people homeless. *See* Carlos Marquez, What If? Puerto Rico's Economy: It's a Matter of Status, P.R. Herald, Aug. 5, 2004. Migrants fled ravaged rural communities for San Juan, and there, lacking the resources for anything else, they began settling the swampland around the Martin Peña Canal.

Generations of Puerto Ricans have since migrated from the countryside to the city, and the canal area is now home to some 30,000 residents in eight distinct communities spanning hundreds of acres. *See* P.R. Laws Ann. tit. 23, § 5032. Residents have made the swampland habitable by sinking dirt, garbage, and debris into the swampland until it became firm enough to support the makeshift homes they built from salvaged wood and corrugated tin. There are no paved roads and few basic utilities. Sewage has flowed directly into the canal or into improvised septic systems.

These communities fall well below the poverty line. Many residents are the backbone of San Juan's skilled labor force, and their purchases sustain many of the city's small businesses. These are, as the Puerto Rican legislature has recognized, "communities of irreplaceable importance for the city." Act of September 24, 2004, No. 489, Statement of Motives.

The canal area is, however, also in a state of environmental crisis that has threatened the whole San Juan Bay Estuary system. The wetlands have become dry land. The canal, once some four hundred feet wide at points, has shrunk so much that it no longer serves as the vital link between the San Jose Lagoon and San Juan Bay. Instead, water from the Lagoon floods the settlements, dredging up raw sewage and eighty years' worth of detritus, sweeping away the ground beneath the homes, and imperiling residents.

By 2001, the Commonwealth and the U.S. Army Corps of Engineers, recognizing the severity of this problem, had committed to a far-reaching project to dredge the canal, restore the flow of water, and clean up decades of environmental pollution. Because the lack of sewage systems has been a major source of pollution, as well as a major health hazard, the government has also committed to rehabilitating and revitalizing the canal and its communities as a central aspect of this project. The government estimates that the project will take at least twenty years to complete.

This project has the potential to transform the canal and its surrounding land, and community residents have a strong stake in shaping its direction. Dredging the canal means relocating those canal residents located closest to the water; rehabilitating and revitalizing the area also means that it will be more attractive to commercial developers. Sensitive to these concerns, a central purpose of the rehabilitation project, designated the Martin Peña ENLACE Project, is to ensure the long-term survival of canal communities.

While the Commonwealth has repeatedly assured residents that forced relocation is not an option, the project has nonetheless generated pressing questions about land ownership in the canal area. Various public agencies of the Commonwealth and Municipality had some claim to title on several hundred acres of this land. Other parcels of land were abandoned when settlers arrived, and some have been abandoned since. The contours of the land have changed as the canal receded. Settlers have, in any event, occupied the lands surrounding the canal indiscriminately, in some cases for many decades, further complicating questions of land ownership. In the past, the Commonwealth and the Municipality experimented with different processes for recognizing residents' titles to land they have long occupied. But many of these processes may not have complied with basic property registration requirements under Puerto Rican law, leaving many residents uncertain about whether they own the land upon which they live.

In practice as well as in name, the ENLACE Project has relied on community engagement to develop solutions to these difficult questions. Beginning in 2001, residents, under the auspices of the Commonwealth's Department of Transportation and Public Works and the Highways and Transportation Authority, started developing a land-use plan tailored to residents' social, economic, and environmental needs. Three years and several hundred community meetings later, participants agreed on a community land trust model to solve the ownership question and to manage the lands in the canal area for the community at large.[4]

On September 24, 2004, Puerto Rico enacted Law 489, which spelled out how the environmental rehabilitation of the canal and the preservation and revitalization of its surrounding communities would be implemented. The law adopted the model of "integrated development based on community empowerment" as "the public policy of the Commonwealth of Puerto Rico." P.R. Laws Ann. tit.

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[4] Community land trusts (CLTs) have long been championed as a solution to the problem of affordable housing in urban communities. See J.J. Kelly Jr., Land Trusts that Conserve Communities, 59 DePaul L. Rev. 69, 70-71 (2009). CLTs are usually nonprofit, democratically run organizations of community members that own land in the area and hold it in trust for the community's benefit, while selling or leasing the homes built upon the land at low cost. *Id.* Because the trust cannot generally sell the underlying land and can usually place conditions on the sale of homes on the land, both of which are true here, the CLT model aims to rehabilitate urban communities while deterring land speculation and gentrification by private developers. *Id.* at 79-84.

23, § 5032. Law 489 again committed the government to minimizing residents' dislocation as the rehabilitation of the canal proceeded. *See id.* It also created two entities, the Corporation and the Fideicomiso, which were charged with implementing particular aspects of these broader goals. *Id.* §§ 5033, 5048.

The Corporation was charged with coordinating and implementing all aspects of the dredging of the canal, housing development, and urban planning in the canal area, and was to ensure active and constant participation by canal residents. *Id.* § 5033. As part of that process, article 16 of Law 489 mandated that title to any lands in the canal area owned or managed by public agencies of the Commonwealth or Municipality would automatically pass to the Corporation 160 days after Law 489 took effect. *Id.* § 5045. Article 17 further provided that once the Commonwealth determined which lands around the canal were part of the maritime-terrestrial zone and in the public domain, the remaining lands would be "declared patrimony of the Commonwealth under the ownership rights of the Corporation," and title would formally transfer to the Corporation. *Id.* § 5046.

The Fideicomiso, as a land trust, was to be created from the lands the Corporation received from public agencies under article 16 and the public patrimony lands the Corporation held under article 17. *Id.* § 5048. The transfer of these lands from the Corporation to the Fideicomiso was to occur once the Corporation prepared regulations to govern the

Fideicomiso's operations. *Id.* The Fideicomiso's purposes, under Law 489, included "contribut[ing] toward the solution of the ownership rights problem of many District residents through collective landholding," *id.* § 5048(a) (1), and "acquir[ing] and possess[ing] lands on behalf of the community, thus increasing local control over the land and avoiding absentee owner decision-making," *id.*. § 5048(a) (4).

Regulations governing the Fideicomiso's operations were promulgated in 2008. They again stressed the Fideicomiso's role as a "mechanism of collective possession in order to solve the problem of the lack of ownership titles" and to "avoid involuntary displacement" of canal residents. Land Trust Regulations art. I, § 1. They further emphasized the Fideicomiso's mission "to own, watch over and administer all lands that the Corporation transfers to it" and any future land it acquires, a mission that precluded the Fideicomiso from selling these lands. *Id.* art. III, § 3.2. The land transfer proceeded, and on May 14, 2009, the Corporation formally deeded the public lands it had received to the Fideicomiso.

One month later, on June 18, 2009, the Puerto Rican government--now under the leadership of a different political party--enacted Law 32. Law 32 retroactively amended article 16 of Law 489 so that title to any properties held by the Corporation or the Fideicomiso that had been transferred by the Commonwealth or Municipality would revert back to them. Act of June 23, 2009, No. 32, art. 1. Law 32, by its terms, left intact most of the rest of Law 489,

including its statement of goals and section 5048, the section that created the Fideicomiso. *See id.*

Law 32 does not place any conditions on what the Municipality can do with these lands, though the rest of Law 489, which sets out a comprehensive plan for the future of the canal area, remains in effect. *See id* Under Law 32, Commonwealth agencies that originally held lands in the canal area are to study the status of the titles and determine whether the agency should retain the lands or should instead transfer them. *Id.* Agencies can transfer the land so long as the transfer would not impede citizens' access to essential services. *Id*

When Law 32 was enacted, the Fideicomiso had claimed title to approximately two hundred acres of land, all of which had originally been held by the Commonwealth or Municipality and had been transferred from the Corporation to the Fideicomiso. At present, these are lands where canal residents live and have built themselves homes.

After initial skirmishes over whether the Fideicomiso could get a temporary restraining order or preliminary injunction to stop Law 32 from taking effect, on November 10, 2009, the district court issued an opinion in which it declined to reach the question of preliminary injunctive relief. Instead, it dismissed the case and abstained under the *Pullman* abstention doctrine.[5] *See Fideicomiso de la Tierra*

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[5] Under *Pullman* abstention, federal courts ordinarily stay the federal action instead of dismissing it. *Mangual* v. *Rotger-*

del Caño Martin Peña v. *Fortuño*, 670 F. Supp. 2d 132, 141-42 (D.P.R. 2009). The Fideicomiso now appeals.

II. Jurisdiction

We first address some basics. Article III limits our jurisdiction to "cases and controversies," and our "obligation to inquire *sua sponte* into our jurisdiction over the matter" exists in every case. *Doyle* v. *Huntress, Inc.*, 419 F.3d 3, 6 (1st Cir. 2005).

That obligation extends to determining whether a party has constitutional standing to sue, meaning that it has suffered an injury in fact "causally connected to the challenged conduct" and capable of being remedied through suit. *Pagán* v. *Calderón*, 448 F.3d 16, 27 (1st Cir. 2006) (citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Though the defendants have asserted that the Fideicomiso never legally owned the lands transferred to it by the Corporation, that argument does not deprive the Fideicomiso of Article III standing. We need not define the precise nature of the Fideicomiso's interests in these lands to hold that they are sufficient to establish an injury in fact if Law 32 is enforced. Law 32 is directed explicitly at the Fideicomiso and creates an injury in fact by its very terms, which state that any Commonwealth and

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Sabat, 317 F.3d 45, 63 (1st Cir. 2003). We do not need to reach the issue of whether the failure to stay was error.

municipal lands transferred to the Fideicomiso will immediately return to it. Act of June 23, 2009, No. 32, art. 1. Article III standing is no bar to our exercise of jurisdiction in this case.

To the extent that the question of ripeness presents Article III limitations on our jurisdiction, there is no such jurisdictional hurdle on the theory pled here. It is true that *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City,* 473 U.S. 172 (1985), held a plaintiff's claim for just compensation under the Takings Clause was unripe where the plaintiff had not gone through state procedures for obtaining compensation. *Id.* at 195. But there is no just compensation claim here.

We agree with the vast majority of circuits to address this issue, which have held that this ripeness requirement of going through state procedures does not apply to claims that a taking was not for a "public use." *See Carole Media LLC* v. *N.J. Transit Corp.*, 550 F.3d 302, 308 (3d Cir. 2008); *Rumber* v. *Dist. of Columbia,* 487 F.3d 941, 944 (D.C. Cir. 2007); *Montgomery* v. *Carter County,* 226 F.3d 758, 766-68 (6th Cir. 2000); *McKenzie* v. *City of White Hall,* 112 F.3d 313, 317 (8th Cir. 1997); *Armendariz* v. *Penman,* 75 F.3d 1311, 1320-21 & n.5 (9th Cir. 1996) (en banc), *abrogated on other grounds by Lingle* v. *Chevron U.S.A., Inc.,* 544 U.S. 528 (2005); *Samaad* v. *City of Dallas,* 940 F.2d 925, 936-37 (5th Cir. 1991); but *see Forseth* v. *Vill. of Sussex,* 199 F.3d 363, 369 N.8, 372-73 (7th Cir. 2000). That is so because "[p]rivate-use takings .are

unconstitutional regardless of whether just compensation is paid," and, unlike just compensation claims, state proceedings to determine appropriate compensation would not obviate the constitutional question. *Montgomery,* 226 F.3d at 766-67.

Nor is this a case where the federal courts should decline to exercise jurisdiction under the discretionary doctrine of *Pullman* abstention. *Pullman* abstention avoids unnecessary federal court interference by deferring to state courts on important, unsettled areas of state law; however, it is appropriate only when "substantial uncertainty exists over the meaning of the state law in question, and . . . settling the question of state law will or may well obviate the need to resolve a significant federal constitutional question." *Batterman* v. *Leahy,* 544 F.3d 370, 373 (1st Cir. 2008). The latter condition is not satisfied here.

The Fideicomiso's Takings Clause claim does not turn on questions of Puerto Rican law, including questions of whether the Corporation could legally transfer public agencies' lands to the Fideicomiso, whether the Fideicomiso is a public or private entity,[6] its powers as a trust, or whether the lands in

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[6] On appeal, the parties focus on this issue as central to whether the Fideicomiso could state a claim under the Takings Clause, on the theory that there can be no taking if the Fideicomiso had no cognizable property rights. The Fourth Circuit has instead characterized whether a plaintiff is a public entity capable of suing the state for an alleged constitutional violation as an Eleventh Amendment issue because of the stakes for the state's sovereign dignitary interests. *See*

question are considered private property, all of which are bitterly contested. *See Fideicomiso,* 670 F. Supp. 2d at 137-40.

The gravamen of the Fideicomiso's Takings Clause claim is that it is entitled to stop the alleged taking entirely, as opposed to receiving just compensation, because Law 32 is not a taking for "public use." Irrespective of whether the Fideicomiso is, as it claims, a private owner of lands considered private property under Puerto Rican law, it cannot

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Virginia v. *Reinhard,* 568 F.3d 110, 122-23 (4th Cir. 2009). We need not engage in an Eleventh Amendment analysis. Other circuits have classified this question yet differently under the rubric of standing, *see, e.g., id.* at 123 n.3 (collecting cases), though the reasoning in some cases has not invoked Article III considerations. *Id.*

Whatever the formal label, this is not the kind of jurisdictional issue we must address first under *Steel Company* v. *Citizens for a Better Environment,* 523 U.S. 83 (1998). *See Davignon* v. *Clemmey,* 322 F.3d 1, 11 (1st Cir. 2003) (interpreting *Steel Company* as holding that difficult jurisdictional questions need only be addressed before the merits if they implicate Article III's "case or controversy" requirement). Instead, this is the kind of thorny question we have avoided when, as here, another issue is dispositive. *See Parella* v. *Ret. Bd of the R.I. Employees' Ret. Sys.,* 173 F.3d 46, 56 n.6, 58-62 (1st Cir. 1999) (avoiding deciding whether the defendant was an "arm of the state" for Eleventh Amendment purposes because plaintiffs' Takings and other constitutional claims failed on the merits).

We do not reach this issue, and for this reason, we also do not address the Seventh Circuit's opinion in *Illinois Clean Energy Community Foundation* v. *Filan,* 392 F.3d 934 (7th Cir. 2004), which held that a foundation created by statute was not a state agency and could bring a Takings Clause claim against the state. *Id.* at 936-37.

obtain the relief it seeks if its "public use" argument fails. Unlike the ancillary questions identified by the district court, this is a question of federal constitutional law. *See Kelo* v. *City of New London,* 545 U.S. 469, 479-83 (2005). Because the Fideicomiso cannot prevail on its argument that Law 32 is not for "public use," as discussed below, abstention is unwarranted.

III. The Takings Clause "Public Use" Claim

The public use requirement of the Takings Clause mandates that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Thompson* v. *Consol. Gas Utils.Corp.,* 300 U.S. 55, 80 (1937). Under those circumstances, a "plaintiff that proves that a government entity has taken its property for a private, not a public, use is entitled to an injunction against the unconstitutional taking, not simply compensation." *Carole Media,* 550 F.3d at 308; *see also Ramirez de Arellano* v. *Weinberger,* 745 F.2d 1500, 1521-22 (D.C. Cir. 1984), *rev'd on other grounds sub nom, Weinberger* v. *Ramirez de Arellano,* 741 U.S. 113 (1985). Plaintiff's claim falls under this public use branch of the doctrine.

The Fideicomiso says that the alleged "taking" under Law 32 is not for "public use" because it serves no legitimate purpose and undercuts the purposes of Law 489. It argues that the government has failed to consistently identify any legitimate goal for Law 32. Even if the government had, the Fideicomiso further

argues, Law 32's alleged confiscation and transfer of lands to public agencies bears no reasonable relationship to any possible legitimate purpose. This is so not least because Law 32, in the Fideicomiso's view, relieves public agencies from the obligation to advance the goals of the ENLACE Project identified in Law 489. These goals in Law 489 are indisputably public purposes.[7] The end result of Law 32, the Fideicomiso warns, will be to end community participation in the ENLACE Project, to allow public agencies to facilitate speculation by private developers, and to displace community residents.

These are serious arguments, but they are not grounds for a claim under the Takings Clause of the U. S. Constitution. Public policy disagreements about the best of several rational means to accomplish legitimate public purposes are not the grist of a Takings Clause claim. Our review of whether a taking is for "public use" is necessarily deferential: "When the legislature's purpose is legitimate and its means are not irrational, empirical debates over the wisdom of takings. . . are not to be carried out in the federal courts." *Haw. Housing Auth.* v. *Midkiff*, 467 U.S. 229, 242-43 (1984); *see also Goldstein* v. *Pataki*, 516 F.3d 50, 57-58 (2d Cir. 2008).

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[7] The fact that under Law 489 the land may, after improvements, be leased to private parties does not mean that Law 489 lacks a public purpose, *see Berman* v. *Parker*, 348 U.S. 26, 33-36 (1954), nor does the Fideicomiso so argue.

Well before the *Kelo* decision, the Supreme Court had recognized two categories of quintessentially legitimate public uses under the Takings Clause: takings that transfer private property to public ownership, resulting in the administration of lands for the public good, *see, e.g., Old Dominion Land Co.* v. *United States,* 269 U.S. 55, 66 (1925); *United States* v. *Gettysburg Elec. Ry. Co.,* 160 U.S. 668, 681-83 (1896); *Shoemaker* v. *United States,* 147 U.S. 282, 297 (1893), and takings that make property available for use by the general public, *see Kelo,* 545 U.S. at 478-79 (noting that this category has long been deemed "sufficient to satisfy the public use requirement"). These two categories, of course, continue to be legitimate public uses under *Kelo.*

Law 32, by its terms, revokes the transfer of public agencies' lands to the Fideicomiso and returns the lands to public ownership through agencies of the Commonwealth and the Municipality.[8] This transfer to public ownership reflects the Commonwealth's judgment that the goals of rehabilitating and revitalizing the canal will be better served, and will be consistent with other missions of its public agencies, if these agencies, rather than the Fideicomiso and the Corporation, again hold and administer the lands in the canal area they once owned. There can be no doubt that Law 32's transfer

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[8] Thus the category of cases in which the property is transferred to another private party, *see, e.g., Kelo*, 545 U.S. at 478-83; *Midkiff*, 467 U.S. at 241-42; *Berman*, 348 U.S. at 33-36, is not involved here.

to public ownership is for "public use" under the Takings Clause.[9]

The Fideicomiso's argument is largely that it disagrees with the different choice of mechanisms made in Law 32, as opposed to those originally made in Law 489, to effectuate public purposes. The tensions the Fideicomiso identifies between Law 32 and Law 489 do not make Law 32's transfer of lands to public agencies an irrational or even a suspect means of achieving public purposes. Law 32 itself says its purpose is to harmonize Law 489 with other laws and to clarify that public domain lands are not transferrable. The government has argued that through Law 32, experienced public agencies will regain ownership of lands in the canal, and this will facilitate better and faster completion of projects to advance the area's revitalization and development. The government argues that five years have passed under the Fideicomiso land trust model and there has been no real progress towards meeting Law 489's environmental rehabilitation and development goals. All of this, the government concludes, justifies a different approach. Whatever the wisdom of this choice of different means by the legislature and governor, a federal court cannot conclude Law 32 was an illegitimate means of advancing a public purpose, not least because transfers of private

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[9] At oral argument, the government represented that those public agencies must, under Law 32, continue to administer the lands for the benefit of canal residents and for all the other stated public purposes originally articulated in Law 489.

property to public ownership have been upheld since the founding of our country.

There are no other circumstances presented by this case that would warrant the remedies of injunctive and declaratory relief for the Fideicomiso's Takings Clause claim. The Fideicomiso says if Law 32 goes into effect, the Fideicomiso will be prevented from carrying out its statutory purpose; that may be true. It does not follow, as the Fideicomiso argues, that the communities surrounding the canal will be dislocated as a result. "Irreparable harm" in the takings context cannot simply mean the risk that the means the government has chosen to implement a public policy will have undesirable consequences.[10] The Takings Clause is not a means for federal courts to second-guess the legislature's choices about the

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[10] Though the Supreme Court has granted declaratory and injunctive relief for a limited number of Takings Clause claims beyond "public use" challenges, it has also made clear that these cases are exceptional and limited to their facts. Those cases, moreover, involved regulatory takings, not physical takings. *See E. Enterprises* v. *Apfel*, 524 U.S. 498, 521-22, 528-537 (1998) (plurality opinion) (granting declaratory and injunctive relief for a regulatory takings claim on the facts of a Tucker Act case where the alleged taking resulted in severe, retroactive, and unforeseeable liability for a small number of parties and the Claims Court process would not provide a sufficient remedy); *Babbitt* v. *Youpee*, 519 U.S. 234, 237, 243-45 (1997) (invalidating and enjoining further enforcement of a federal statutory provision that effectively eliminated certain Native American landowners' ability to leave fractional interests in property to their successors); *Irving* v. *Hodel*, 481 U.S 704,716-18 (1987) (invalidating and enjoining an earlier version of this provision).

best mechanisms to achieve what are undeniably public policy goals.

IV. Other Constitutional Claims

In its complaint, the Fideicomiso cursorily challenged Law 32's constitutionality under the Due Process Clause, the Contracts Clause, and the Ex Post Facto Clause. But the Fideicomiso did not develop these arguments before the district court, nor has it preserved them for appeal. The Fideicomiso's motion for a preliminary injunction centered entirely on the merits of its Takings Clause claim. It mentioned its other claims only in passing, omitting both case citations and any indication of the gravamen of these claims. The Fideicomiso's brief on appeal likewise relies solely on its Takings Clause claim to argue the merits of its case. That is waiver; we do not reach these other claims. *See Mass. Museum of Contemporary Art Found.* v. *Büchel,* 593 F.3d 38, 65 (1st Cir. 2010).

We *vacate* the district court's judgment and the stay we entered, and we direct entry of judgment of dismissal with prejudice of all federal claims and dismissal of all claims under Puerto Rican law without prejudice. No costs are awarded.

So ordered.

-Concurring Opinion Follows-

TORRUELLA, ***Circuit Judge*** (Concurring). I join the majority in holding that Plaintiff-Appellant,

Fideicomiso del Caño Martin Peña ("the Fideicomiso"), cannot show that Law 32 fails to pursue a "public use" as required by the Fifth Amendment's public use clause.[11] I write separately to clarify my view that Law 32 pursues the public purposes of economic, social, environmental, and community redevelopment that were carefully plotted in Law 489. Under settled Supreme Court precedent, -- including the latest decision in *Kelo* v. *City of New London*, 545 U.S. 469 (2005) -- economic and community redevelopment are legitimate public purposes. Viewing Law 32 within the statutory and regulatory framework adopted by Law 489, it is manifest that Law 32 pursues these public goals through public ownership of lands. Eschewing any views regarding the wisdom of transferring lands to public ownership in order to effectuate the goals of the ENLACE Project, I cannot say that Law 32 lacks a public purpose.

I.

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[11] The Takings Clause of the Fifth Amendment applies to the states through the Fourteenth Amendment. *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005). Though the Supreme Court has not held that the Takings Clause of the Fifth Amendment is applicable to the Commonwealth of Puerto Rico, we have dispelled any "doubts" regarding the application of the clause to the Commonwealth of Puerto Rico. *Tenoco Oil Co., Inc.* v. *Dep't of Consumer Affairs*, 876 F.2d 1013, 1017 n.9 (1st Cir. 1989); *see also Culebras Enter. Corp.* v. *Rivera Rios*, 813 F.2d 506 (1st Cir. 1987) (assuming, in the context of an inverse condemnation action under Puerto Rico law, that the Takings Clause applies to the Commonwealth of Puerto Rico).

In 2001, the Commonwealth of Puerto Rico ("the Commonwealth") developed a comprehensive development project denominated the Martin Peña Canal ENLACE Project (the "ENLACE Project") under the direction of the Department of Transportation and Public Works. The project's stated purpose was to rehabilitate and revitalize the Martin Peña Canal District. The ENLACE Project came to fruition on September 24, 2004 when the Commonwealth's legislature promulgated Law 489, also known as "the Martin Peña Canal Special Planning District Integrated Development Act." P.R. Laws Ann. tit. 23, §§ 5031-5066. Among other things, Law 489 articulated clear public policy goals: (1) to rehabilitate the San Juan Bay Estuary; (2) to improve the living conditions of the communities located along the Martin Peña Canal through community empowerment; and (3) "t[o] promote civic and democratic development through the active participation of the residents in the planning and rehabilitation processes of the area." *Id.* § 5032. Law 489 established two basic entities to pursue these goals: the ENLACE corporation and the Fideicomiso, or Land Trust.

The ENLACE Corporation was endowed with the responsibility of "coordinating the implementation of all aspects of the ENLACE Project; including, without being limited to, housing development, infrastructure, the dredging and canalization of the Canal, as well as urban and socio-economic development." *Id.* § 5033(1). In turn, the Fideicomiso was created to, inter alia, deal with land

ownership issues; acquire and possess lands on behalf of the community; handle the displacement of the low-income residents; guarantee affordable housing; and foster "participation of the residents and the strategic investment of the private sector." *Id.* § 5048 (a) (5).

By virtue of Law 489, all publicly-held lands within the District were transferred to the ENLACE Corporation. *Id.* § 5045. ("The public agencies. . . that manage, hold in custody, have dominion over, lease or own lands in the District shall be understood through this chapter as having transferred the respective title to the Corporation after one hundred sixty days (160) as of the effectiveness thereof."). Ownership rights over "lands of public domain or patrimony" remained "vested" in the ENLACE Corporation, with certain exceptions regarding lands in the maritime-terrestrial zone. *Id.* Ultimately, these lands were to be transferred from the Corporation to the Fideicomiso. *Id.* § 5048 ("The Martin Peña Canal Land Trust shall consist of all the lands transferred to the Corporation.").

In May 2007, the Integral Development and Land Use Plan of the Special Planning District of the Caño Martin Peña was approved by the Governor of Puerto Rico. The Plan sought to "improve the quality of life of the residents of the District through mechanisms aimed at overcoming poverty, [and] harmonizing the relationship between the District's communities and their natural environment . . . " Appellant's Appendix, Vol. III, Exhibit E at 1432.

On June 18, 2009, the Commonwealth's legislature passed Law 32 "to amend Article 16 of Law No. 489 of September 24, 2004." [12] Law 32 provides, inter alia, that "any of the[ ] properties which have been transferred to the Corporation or [the] Fideicomiso, will revert to the original Agency or Title Holder," and "[a]ny lot or parcel of land which by virtue of Law 489 has been registered in the name of the Corporation or the Fideicomiso, will revert to its original titleholder condition until such time as every study, action or procedure has been accomplished in accordance with this Act." Law 32 also revoked any transfers of Municipal lands to the Fideicomiso or the ENLACE Corporation, and invalidated any efforts by the Fideicomiso or the ENLACE Corporation to register Municipal lands in their names.

After the Governor of Puerto Rico signed Law 32, the Fideicomiso filed the present suit challenging Law 32 under the Takings and Due Process clauses of the 5th and 14th Amendments to the United States Constitution and equivalent provisions of the Puerto Rico Constitution. The Fideicomiso stresses that the Government has failed to articulate a coherent and legitimate explanation of the public purposes behind Law 32. The Fideicomiso also contends that in allowing the Commonwealth to place land titles among a host of public agencies, Law 32 contravenes Law 489's goals to foster

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[12] As previously mentioned, Article 16 of Law 489 provided for the transfer of lands in the Martin Peña Canal District to the ENLACE Corporation.

community participation, and avoid speculation and displacement of the communities. On the other hand, the Commonwealth argues that governmental control over the lands would jump-start the ENLACE Project which was delayed for close to five years due to what the government claims was the Fideicomiso's inability to complete the different stages of the ENLACE Project in a timely fashion. The Commonwealth further explains that Law 32 creates a mechanism to allow public agencies to participate in the ENLACE Project.

II.

The Fideicomiso, as "a party challenging governmental action as an unconstitutional taking[,] bears a substantial burden" in this case. *E. Enter.* v. *Apfel,* 524 U.S. 498, 523 (1998). Supreme Court precedent requires this court to defer to legislative judgments of what constitutes a public use or purpose. *See Kelo,* 545 U.S. at 480 ("Without exception, our cases have defined that concept [public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments in this field.") *Hawaii Hous. Auth.* v. *Midkiff,* 467 U.S. 229, 240 (1984). Once a public use is established, we owe deference to the legislative judgment regarding the means chosen to attain it. *Berman* v. *Parker,* 348 U.S. 26, 33 (1954) ("Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine."); *Old Dominion Land Co.* v. *United States,* 269 U.S. 55, 66 (1925) (holding that once Congress declared a public

use, "[i]ts decision is entitled to deference until it is shown to involve an impossibility").

However, deference to the legislature in the takings context does not mean abdication of the court's duty to find that there is indeed a public purpose being served. Despite the Fideicomiso's better efforts to show that Law 32 lacks any public use or purpose, a review of Law 32 reveals that in passing the statute, the Commonwealth's legislature simply chose different means to achieve the goals and undoubtedly public purposes that were carefully delineated in Law 489. Also, as the majority opinion recognizes, Law 32 transferred lands to public ownership, thereby meeting an undoubtedly public purpose.

It is of utmost importance to clarify that Law 32 amended *one Article of Law 489* -- Article 16 -- and maintained Law 489's comprehensive provisions that define the policy goals behind the ENLACE Project. As the Commonwealth argues, the principles, purposes, and objectives of Law 489 are in effect. In enacting Law 32, the Commonwealth's legislature simply chose alternate means to achieve the development and rehabilitation goals set forth in Law 489. Absent any indication that Law 32 amounts to an unreasonable or irrational avenue to undertake the ENLACE Project, we cannot second-guess the legislature in this case. *Midkiff*, 467 U.S. at 242-43 ("When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings -- no less than debates over the wisdom of

other kinds of socioeconomic legislation -- are not to be carried out in the federal courts.").

Furthermore, the claim that Law 32 is devoid of any public use is inconsistent with the broad interpretation the Supreme Court has given to the Fifth Amendment's public use requirement. *See Berman,* 348 U.S. at 33 (recognizing that community redevelopment served a public purpose and stating that "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled"); *Midkiff,* 467 U.S. at 242 (holding that state efforts to avert land oligopoly and correct deficiencies in the land market served a valid public purpose); *Nat'l R.R. Passenger Corp.* v. *Boston & Maine Corp.,* 503 U.S. 407, 422-23 (1992) (upholding determination that transfer of railroad tracks from one party to another that would better maintain the tracks pursued the valid public purpose of facilitating rail operations). In its recent decision in *Kelo,* the Supreme Court held that a "carefully considered" economic development plan which was found to have been adopted after "thorough deliberation", satisfied the public use requirement. 545 U.S. at 478, 484. In so holding, the court recognized the principle that a carefully considered governmental economic development plan pursues a public use where the scheme seeks to promote economic redevelopment and is designed to provide economic benefits to the community.

It is uncontested that the ENLACE Project was adopted to rehabilitate and revitalize the Martin

Peña Canal and its communities; it seeks to conduct extensive public works and improvements; and to deal with environmental degradation, and landownership issues. These are public purposes that were adopted in the context of a thorough, comprehensive, and detailed development plan, that pursuant to Law 32 will be carried out through the intervention and active participation of several public agencies. In light of the Supreme Court's decision in *Kelo,* it is clear that the ENLACE Project serves valid public purposes. While Law 32 altered the statutory scheme that was put in place by Law 489, the ENLACE Project is still alive and there is no indication that the Commonwealth has abandoned the goals of rehabilitating and revitalizing the Martin Peña Canal. The mere fact that the Commonwealth's legislature decided to pursue the goals of the ENLACE Project by transferring lands from the Fideicomiso to a host of public agencies does not render Law 32 unconstitutional under the Takings Clause.[13] More importantly, it is manifest that a governmental project by which the government owns and administers lands for the benefit of the public or community pursues a valid public purpose. *Cf. Rindge Co.* v. *Los Angeles County,* 262 U.S. 700, 706-07 (1923) (recognizing

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[13] The determination that the Fideicomiso cannot succeed in its claim that Law 32 is facially unconstitutional should not be interpreted as barring future as-applied takings challenges if it is shown that lands in the Martin Peña Canal District are taken for purely private purposes, *Midkiff,* 467 U.S. at 245, or "under the mere pretext of a public purpose," *Kelo,* 545 U.S. at 478

that the taking of property to build a highway is one for public use and explaining that "[i]t is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in an improvement in order to constitute a public use").

Law 32 reflects a legislative judgment that the public purpose of community redevelopment in the Martin Peña Canal district is better served through public ownership of the lands in controversy. Because I cannot deem Law 32 as employing irrational means to achieve the public goals delineated in Law 489, I join the majority in holding that the Fideicomiso's challenge under the public use clause fails on the merits.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

FIDEICOMISO DE LA TIERRA DEL CAÑO MARTIN PEÑA,	)	
Plaintiff,	)	
v.	)	Civil No. 09-1581 (FAB)
LUIS G. FORTUÑO, *et al.*,	)	
Defendants	)	

OPINION & ORDER

BESOSA, DISTRICT JUDGE

Pending before the Court are several issues which have been briefed by the parties pursuant to the Court's orders. (*See* Docket Nos. 10 and 48) After examining the arguments contained in the parties' briefs regarding *Pullman* abstention, the Court hereby **DISMISSES** this case **WITHOUT PREJUDICE** due to the presence of unsettled issues of Puerto Rico law which have the potential to render consideration of any federal constitutional issues unnecessary.

DISCUSSION

I. Background

In September of 2004, Puerto Rico Law 489, P.R. LAWS ANN. tit. 23, §§ 5031-66, ("Law 489") was approved by the Puerto Rico Legislature. Law 489 is also known as the "Martin Peña Canal Special Planning District Integrated Development Act." (Docket No. 6 at ¶¶ 4.1-4.2) Law 489 was adopted in order to address the environmental issues of the Martin Peña Canal and "rehabilitate and revitalize the communities along its north and south banks in order to promote a healthy relationship between the natural environment and its surrounding city and communities, with a vision of integrated development based on community empowerment." *See* P.R. LAWS ANN. tit. 23, § 5032. The communities within the scope of the act form the Special Planning District of Martin Peña Canal ("Special Planning District"), which includes Barrio Obrero, Barrio Obrero Marina, Buena Vista Santurce, Las Monjas, Parada 27, Buena Vista Hato Rey, and Israel-Bitumul. P.R. LAWS ANN. tit. 23, § 5031.

In order to further the statute's land use development plan for the Special Planning District, Law 489 provides for the creation of the Martin Peña Canal ENLACE Project Corporation ("ENLACE") and plaintiff, the Martin Peña Canal Land Trust ("Land Trust" or "Plaintiff"). P.R. LAWS ANN. tit. 23, §§ 5046, 5048. Law 489 gives these two entities certain powers and duties to manage and develop the lands within the Special Planning District. *See* P.R.

LAWS ANN. tit. 23, §§ 5033-40, 5048. The Land Trust alleges that, in order to exercise its assigned powers and duties, Law 489 gives it ownership rights to approximately two hundred acres of land in the Special Planning District. (Docket No. 6 at ¶¶ 3.5, 4.13-4.14, 4.21)

On June 23, 2009, the Puerto Rico Legislature passed Puerto Rico Law 32 ("Law 32"), which amended Law 489 to change provisions relating to the transfer of properties within the Special Planning District. (Docket No. 6 at ¶¶ 4.24-4.26; Docket No. 58-2) Law 32 states that its purpose is to "harmonize" Law 489 with "other laws that also have as their purpose matters of the highest public interest." (Docket No. 58-2 at 1) The amendment provides for the reversion of title of certain properties within the Special Planning District to the Municipality of San Juan ("Municipality") and to Puerto Rico public agencies. (*See* Docket No. 58-2) Plaintiff alleges that Law 32's reversion of title interferes with its ownership of properties transferred to it by Law 489. (Docket No. 6 at ¶ 1.1)

On June 26, 2009, the Land Trust filed an amended complaint against: (1) Luis G. Fortuño, in his official capacity as Governor of the Commonwealth of Puerto Rico ("Fortuño"); (2) Antonio Sagardia, in his official capacity as Attorney General of the Commonwealth of Puerto Rico ("Sagardia"); (3) the Municipality; (4) Jorge Santini, in his official capacity as the Mayor of the Municipality ("Santini"); (5) the Puerto Rico Electric Power Authority ("PREPA"); (6) the Puerto Rico

Highways and Transportation Authority ("PRHTA"); and (7) the Puerto Rico Land Administration ("PRLA"). (Docket No. 6 at ¶¶ 3.7-3.14) The complaint alleges claims pursuant to 42 U.S.C. § 1983 ("Section 1983") based on violations of the Takings Clause, the Due Process Clause, and Article I, Section 10 of the United States Constitution. Id. at ¶¶ 5.2-5.4. The complaint also alleges parallel takings and due process claims under the Puerto Rico Constitution. *Id.* at ¶¶ 5.2-5.3. These claims revolve around the legislative transfers of real property pursuant to Law 489 and Law 32. *See id.*

Also on June 26, 2009, the Land Trust filed a motion for a temporary restraining order ("TRO") "prohibiting each of the defendants from in any way disposing of or managing the properties obtained by them by virtue of Law 32 . . . until the court issues its determination with respect to the constitutionality of Law 32." (Docket No. 4 at 8) On June 29, 2009, the Court denied the motion for a TRO and ordered the parties to file briefs no later than July 31, 2009, as to the following issues: (1) whether the Court should abstain from hearing this case based on the *Pullman* abstention doctrine; (2) whether the Land Trust has juridical personality with the capacity to sue and be sued; and (3) whether, under Puerto Rico law, a trust generally, or the Land Trust specifically, can hold title to property, or may only hold property in trust for its true owner. (Docket No. 10)[1] The Court

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[1] Plaintiff subsequently appealed the Court's denial of the motion for a TRO. (Docket No. 35) Although the Court of

subsequently ordered the parties to include in their briefs discussion of whether the Commonwealth of Puerto Rico may, by virtue of the enactment of another statute, transfer title to lands previously transferred to the Corporation from other public agencies or from the public domain by virtue of Law 489, to any other public agency, or return them to the public domain. (Docket No. 48)

On July 31, 2009, the all parties complied with the Court's orders to brief the abovementioned issues. (Docket Nos. 58, 59, 63, 70, 75, & 77) Several defendants also filed motions to dismiss on July 31, 2009, arguing, *inter alia*, that the Court should abstain from adjudicating this case due to the presence of several unsettled issues of Puerto Rico law. (*See* Docket No. 61 at 17; Docket No. 65; Docket No. 76)

Appeals for the First Circuit found that it lacked jurisdiction over the appeal, it stated that "[a]s part of its ruling, the district court should make a finding on the issue of whether the [Land] Trust is a public or private entity." (Docket No. 154 at 7, 9 n. 3) That finding, however, is related to a federal constitutional standing requirement for a Takings Clause claim. *See Asociacion de Subscripcion Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 20 (1st Cir. 2007). Given that *Pullman* abstention has been found appropriate with regard to the Land Trust's federal constitutional claims, it is unnecessary for the Court to make a determination as to the Land Trust's public or private nature at the present time.

II. Legal Analysis

A. Standard for *Pullman* Abstention

"Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). Although abstention is reserved for exceptional circumstances, "'[a]mong those cases that call most insistently for abstention are those in which the federal constitutional challenge turns on a state statute, the meaning of which is unclear under state law.'" *Ford Motor Co. v. Meredith Motor Co.*, 257 F.3d 67, 71 (1st Cir. 2001) (quoting *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 84 (1974)). Pursuant to the abstention doctrine created in *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), "a federal court confronted with such circumstances 'should stay its hand in order to provide the state court an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question.'" *Id.*

"[T]he *Pullman* abstention doctrine serves the dual aims of avoiding advisory constitutional decisionmaking as well as promoting the principles of comity and federalism by avoiding needless federal intervention into local affairs." *Pustell v. Lynn Pub. Schs.*, 18 F.3d 50, 53 (1st Cir. 1994) (citing 17A CHARLES A. WRIGHT, ARTHUR R. MILLER AND EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4242 (1988)). In the particular context of unsettled issues of Puerto Rico law, "abstention [is] especially

beneficial . . . because . . . '[a] rigid rule of deference to interpretations of Puerto Rico law by *Puerto Rico courts* is particularly appropriate given the unique cultural and legal history of Puerto Rico.'" *Cuesnogle v. Ramos*, 835 F.2d 1486, 1495 (1st Cir. 1987) (emphasis in original) (quoting *Posadas de P. R. Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328, 339 n. 6 (1986)).

When determining whether *Pullman* abstention is appropriate, the court must consider: "(1) whether there is substantial uncertainty over the meaning of the state law at issue; and (2) whether a state court's clarification of the law would obviate the need for a federal constitutional ruling." *Ford Motor Co.*, 257 F.3d at 71. The nature of the unsettled issue can also weigh in favor of abstention. *See Pustell*, 18 F.3d at 54 (finding abstention more appropriate where unsettled issue of state law dealt with educational policy); *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998) (holding "land use planning" to be a "sensitive social policy" meriting *Pullman* abstention). Furthermore, "suits for injunctive relief, unlike suits which seek only monetary relief, are highly intrusive into legitimate state functions." *Corporacion Insular de Seguros v. Garcia*, 680 F.Supp. 476, 480-81 (D.P.R. 1988).

B. Unsettled Issues of Puerto Rico Law

After examining the parties' briefs and the statutes which form the basis of the dispute in this case, it is evident that there are unsettled issues of

Puerto Rico Law which militate in favor of *Pullman* abstention. These issues relate to: (1) the Land Trust's legal status; and (2) the validity of any purported legislative transfers of property in Law 489 and Law 32.

Legal Status of the Land Trust

There is significant uncertainty under Puerto Rico law as to the nature of the Land Trust as an entity. Although Law 489 refers to the Puerto Rico Civil Code provisions governing trusts, or *fideicomisos*, it also gives powers and faculties to the Land Trust beyond those typically attributed to trusts. The Land Trust argues that its structure is based on a "Community Land Trust" model used in other parts of the United States, rather than the Puerto Rico Civil Code. (Docket No. 106 at 18) Plaintiff cites its Development Plan stating that the "Community Land Trust" is "a novel and creative means of attending to the situation of ownership in the [Special Planning District] and to minimize involuntary displacement ('gentrification') of the communities." *Id.* The disparity between novel characteristics of the Land Trust and traditional characteristics of a trust under the Puerto Rico Civil Code creates an unsettled issue of Puerto Rico law, the resolution of which could define the rights or powers of the Land Trust.

Under Puerto Rico law, a trust has no independent juridical capacity and cannot hold title to property, sue, or be sued. *See* P.R. Laws Ann. tit. 31, § 2578 (providing that title is to be registered in

the name of the trustee); *Benitez-Bithorn v. Rossello-Gonzalez*, 200 F.Supp.2d. 26, 31 (D.P.R. 2002). The typical trust's incapacity to sue and hold title to property does not cause significant uncertainty over Puerto Rico law in this case. If a typical trust brings suit over property issues, a court may simply replace the trust with the real party in interest who has the capacity to sue and hold title to property, i.e., the trustee(s). *See Benitez-Bithorn*, 200 F.Supp.2d. at 31-32. The significant uncertainty in this case, however, stems from language in Law 489 regarding the Land Trust as an entity that departs from the traditional structure of a trust as contemplated by the Puerto Rico Civil Code.

Law 489 provides that "[t]he Land Trust is hereby created with independent juridical personality." P.R. LAWS ANN. tit. 23, § 5048. Although the statutory provision creating the Land Trust indicates that it will be "the custodian" of "all the lands transferred to the Corporation," the same provision also states that the Land Trust "shall have the ownership rights to the land," and refers to "the lands owned by the Land Trust." P.R. LAWS ANN. tit. 23, § 5048. Pursuant to Law 489, the Land Trust is also given the power to acquire property through various means, including eminent domain, the public nuisance process, and ownership transfer from public entities. P.R. LAWS ANN. tit. 23, § 5048(b)(2)-(7). Furthermore, the Land Trust may issue "participation bonds" as a form of investment in community development. P.R. LAWS ANN. tit. 23, § 5048(b)(10).

The trust, or *fideicomiso*, of the Puerto Rico Civil Code is the result of years of development and interpretation. *See Davila Vega v. Agrait*, 16 P.R. Offic. Trans. 674 (P.R. 1985). "The Puerto Rican 'fideicomiso', an institution with very peculiar characteristics of its own, incorporates the principles of the Anglo-Saxon 'trust' and tries to harmonize them with [Puerto Rico's] civil law tradition." *Davila Vega*, 16 P.R. Offic. Trans. 674 (citing *Alvarez v. Sec'y of the Treasury*, 78 P.R.R. 395, 401-402 (1955), on reconsideration, 80 P.R.R. 15, 20, 33-39 (1957)). In *Davila Vega v. Agrait*, 16 P.R. Offic. Trans. 674 (P.R. 1985), the Puerto Rico Supreme Court describes the historical development of the trust under Puerto Rico law over the course of the twentieth century, which included the incorporation of elements from both the common and civil law traditions. The Puerto Rico Supreme Court has considered various common and civil law sources in defining the nature of the trust under Puerto Rico law when confronted with its "grey zones, . . . gaps and vacuums." *See id.* Given the unique development of the Puerto Rican trust and its incorporation of numerous foreign elements, any decision regarding the legal status of the Land Trust and its novel characteristics adapted from the "Community Land Trust" model is more appropriately left to the Puerto Rico courts.

Validity of Property Transfers in Law 489 and Law 32

Another unsettled issue of Puerto Rico law presents itself in the provisions of Law 489 and Law

32 purporting to transfer property. These provisions create an unclear statutory scheme which has never been interpreted by the Puerto Rico courts. According to the factual allegations in the complaint, the subject of the current litigation is the real property contained within the communities of Barrio Obrero, Barrio Obrero Marina, Buena Vista Santurce, Las Monjas, Parada 27, Buena Vista Hato Rey, and Israel-Bitumul. (*See* Docket 6 at ¶ 4.1-4.2) Law 489, however, is not entirely clear as to what property is subject to its land use development plan. *See* P.R. LAWS ANN. tit. 23, § 5031-66. Neither is it clear as to which public or private entities are actually vested with title to the property falling within the statute's scope. *See id.* The uncertainty regarding the scope and definition of properties is further reflected in Law 32's subsequent amendment to Law 489. (*See* Docket No. 58-2)

The original version of Law 489 has several provisions relating to identification and transfer of various property rights, none of which lend sufficient clarification to preclude *Pullman* abstention. *See* P.R. LAWS ANN. tit. 23, §§ 5045-5048. Section 5045 provides that "[i]n the case of lands of public domain or patrimony, the ownership rights thereof through this chapter shall remain vested [in] the Corporation [ENLACE]," subject to certain exceptions. *See* 23 P.R. LAWS ANN. tit. 23, § 5045. These exceptions are contained in Section 5046, which provides for an official delimitation to be conducted by the Puerto Rico Department of Natural and Environmental Resources related to a canal development project

planned by the United States Army Corps of Engineers. P.R. LAWS ANN. tit. 23, § 5046. After completion of the delimitation, the statute provides for then undetermined land to be transferred to ENLACE. *Id.* ENLACE would then "create the Land Trust with these transferred lands, as provided by this chapter, which it shall manage on behalf of the communities of the [Special Planning District]." *Id.*

Despite Section 5045's statement that ownership of public domain or patrimony lands would remain vested with ENLACE, the original version of Law 489 also contains several provisions discussing ownership rights with respect to the Land Trust. *See* P.R. LAWS ANN. tit. 23, § 5048. As discussed above, Section 5048 provides that the Land Trust will be "the custodian" of "all the lands transferred to the Corporation [ENLACE]." *Id.* Section 5048 also states that the Land Trust "shall have the ownership rights to the land," and refers to "the lands owned by the [Land] Trust." *Id.* Furthermore, Section 5048 states that the Land Trust has the power to acquire other property, including public lands. P.R. LAWS ANN. tit. 23, § 5048(b)(2)-(7).[2]

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[2] Plaintiff argues that the original version of Law 489 clearly gives it ownership rights over public domain lands. (Docket No. 106 at 42-43) It argues that the wording of the official English translation of Law 489 is incorrect, and this Court should instead rely on the authoritative Spanish version of the text. (*See* Docket No. 106 at 42-43) The Land Trust states that the language in Section 5045 stating that title to

Law 32's amendment of Law 489 does little to clarify the scope or direction of the statutory scheme at issue in this case. (*See* Docket 58-2) In its legislative preamble, Law 32 hints at the uncertainty in the original version of Law 489. *See id.* at 1-2. Law 32 states that public agencies and the Municipality "may have their own objectives, purposes, and programs," and that "[i]t is proper, therefore, that to harmonize what it provided in

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public domain and patrimony lands "shall remain vested" in the Corporation, is an error in translation and that a proper translation of the statute would place lands with the Corporation only for the period of time until they were to be transferred to the Land Trust. *Id.* Plaintiff argues that this Court should recognize the translation error and apply the meaning they claim is contained in their certified English translation, which it claims to be closer to the original Spanish version of the statute. Plaintiff states that Puerto Rico law holds original Spanish versions of statutes to be authoritative when there is a discrepancy between the original Spanish version and its English translation. *Id.*; *See* P.R. LAWS ANN. tit. 31, § 13.

Plaintiff's argument, however, only serves to highlight the appropriateness of abstention in the present case. Even assuming, arguendo, a translation error exists, this Court may not rely on any untranslated material in the Spanish language, including the original Spanish version of Law 489, to make a determination as to the accuracy of an English translation. *See Puerto Ricans for P.R. Party v. Dalmau*, 544 F.3d 58, 67 (1st Cir. 2008); Local Rule 10(b). The resolution of property rights that may or may not have been conferred or removed pursuant to Laws 489 and 32 turns on the proper construction of those laws. If, as the Land Trust argues, there is an error in the official translation, the Puerto Rico Courts would be a far more appropriate forum to address that issue, as they may rely on the authoritative Spanish text of the statute.

[Section 5045] with other laws that also have as their purpose matters of the highest public interest, that [Section 5045] be amended." *Id.* Law 32 further finds it necessary "to amend [Section 5045] to suppress the reference to public domain property, since these are not susceptible to individual ownership." *Id.* at 2 (citing P.R. LAWS ANN. tit. 31, § 1025).

The substantive amendments contained in Law 32 only apply to Section 5045 of the original version of Law 489, providing for reversion of title to any property that previously belonged or pertained to the Municipality. (Docket 58-2 at 2) Law 32 also provides for, *inter alia*, reversion of title to agencies of the Commonwealth of Puerto Rico, pending studies to determine which properties are actually appropriate for transfer to the Corporation. (Docket 58-2 at 3) Law 32, however, contains no amendments to other sections of Law 489, thus leaving intact other contradictory provisions of the statute regarding transfer of title and ownership, such as Section 5048. *See* P.R. LAWS ANN. tit. 23, §§ 5046-5048.

In conclusion, Law 489's provisions regarding property are not entirely clear as to the scope of its effect on vaguely defined real property. *See* P.R. LAWS ANN. tit. 23, §§ 5045-5048; (Docket 58-2) This lack of clarity also extends to the transfer of title to any lands affected by Law 489. *See id.* Without further interpretation as to the validity or scope of its land transfers, Law 489 and its subsequent amendment through Law 32 form a substantially

uncertain statutory scheme regarding an undetermined property base and its future land use development plan.

C. Whether the unsettled issues of Puerto Rico law could obviate the need to consider federal constitutional issues

The complaint contains Section 1983 claims based on several alleged constitutional violations, including: (1) violations of substantive and procedural due process; (2) violation of the takings clause; (3) and violation of Article I, Section 10 of the United States Constitution.[3] According to the applicable case law and the allegations of the complaint, all of these constitutional violations are

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[3] Plaintiff alleges two claims under Article I, Section 10 of the United States Constitution. (Docket No. 6 at ¶ 5.4) The first claim alleges that Law 32 constitutes a "Law impairing the Obligation of Contracts." *Id.*; U.S. CONST. art. I, § 10, cl. 1. The second claim alleges that Law 32 constitutes an *ex post facto* law or bill of attainder. (Docket No. 6 at 5.4) The second claim is inappropriate in this case. The Constitutional language prohibiting bills of attainder and *ex post facto* laws deals with individual punishment for past conduct and "retroactivity of penal legislation . . . ," not government interference with private property rights. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 533-34 (1998) (citing *Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798)); *Lynce v. Mathis*, 519 U.S. 433, 440 n. 12 (1997) (citing *United States v. Brown*, 381 U.S. 437, 456-62 (1965)). Given that the complaint only alleges governmental action toward private property rights, the Land Trust's second claim based on Article I, Section 10 of the United States Constitution would not survive even if the court decided against *Pullman* abstention.

based on the validity of property rights held by the Land Trust. *See Franklin Mem. Hosp. v. Harvey*, 575 F.3d 121, 125 (1st Cir. 2009) (takings clause); *SFW Arecibo, Ltd. v. Rodriguez*, 415 F.3d 135, 139 (1st Cir. 2005) (procedural due process); *Maldonado v. Fontanes*, 568 F.3d 263, 272-73 (1st Cir. 2009) (substantive due process); *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992) (contracts clause); (Docket No. 6 at ¶¶ 3.6, 4.23, 5.2-5.4) (alleging federal constitutional claims based on interference with property rights). These property rights "are creatures of state law." *See Chongris v. Bd. of Appeals of Town of Andover*, 811 F.2d 36, 43 (1987) (citing *Bishop v. Wood*, 426 U.S. 341, 344 n. 7 (1976); *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). This Court must therefore look to Puerto Rico law to determine whether the Land Trust has any property rights that may give rise to the constitutional claims alleged in the complaint. *See id.*

Depending on the resolution of the unsettled issues of Puerto Rico law outlined above, the Land Trust may not have the property rights necessary to sustain its federal constitutional claims. The ambiguities and contradictions in Law 489 and Law 32 leave open the possibility that their land transfers are either invalid, or directed toward ENLACE rather than the Land Trust. Furthermore, any determination as to the Land Trust's legal status could affect its ability to hold title to any property, including the property which is the subject of this litigation. Given that state law property rights are

necessary to bring the federal constitutional claims alleged in the complaint, interpretations of these unsettled issues regarding property rights in the Special Planning District could potentially moot any decision of this Court regarding those federal constitutional claims.

D. Abstention in this Case

Both elements for the exercise of *Pullman* abstention are satisfied. *See Ford Motor Co.*, 257 F.3d at 71. This case presents unsettled issues of Puerto Rico law which have not been interpreted by the Puerto Rico courts. The resolution of these issues could potentially nullify any property interest held by the Land Trust, thereby obviating consideration of its federal constitutional claims.

Other factors, such as the nature of the unsettled issues of Puerto Rico law and the relief requested in the complaint, support abstention. With the exception of attorneys' fees, the Land Trust seeks only injunctive and declaratory relief with regard to the land use development plan created by Law 489 and Law 32. (*See* Docket No. 6 at ¶¶ 5.2-5.3, 5.6) This injunctive relief would be highly intrusive federal intervention in a significant state interest, land use planning, which has been accorded special consideration in *Pullman* abstention analysis. *See San Remo Hotel*, 145 F.3d at 1104; *Corporacion Insular de Seguros*, 680 F.Supp. at 480-81. Therefore, it appears that abstention in the present case would further serve the purposes of *Pullman* abstention related to comity and federalism by

decreasing the possibility of federal interference in state law matters. *See Pustell*, 18 F.3d at 53.

Furthermore, special deference is paid to the Puerto Rico courts regarding Puerto Rico law. *See Cuesnogle*, 835 F.2d at 1495. This deference appears especially important in this case, where the Land Trust, a novel entity under Puerto Rico law, claims that the official English translation of a statute is erroneous and argues that Law 489's meaning is clear in light of the original Spanish text. (*See* Docket No. 106 at 42-43) This Court is prohibited from relying on the Spanish version of Law 489, thus making an initial interpretation of the statute in the Puerto Rico courts, both linguistically and legally, all the more appropriate. Given this deference and the factors outlined above, this Court finds *Pullman* abstention appropriate in the circumstances of the present case.

When exercising *Pullman* abstention, a court may stay litigation in the federal forum until the conclusion of state court proceedings or dismiss the case without prejudice. *See Rivera Vazquez v. Asociacion de Residentes de University Gardens*, 220 F.Supp.2d 95, 98 (D.P.R. 2002) (citing *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 88-89 (1975); *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 496 n.9 (1st Cir. 1992)). The particular equitable relief requested by the Land Trust reflects a need for efficiency and convenience. *See Rivera Vazquez*, 220 F.Supp.2d at 99 (citing *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 534-35 (1st Cir. 1995); *El Dia, Inc.*, 963 F.2d at 493-98.

Given that consideration of all federal constitutional claims alleged in the complaint could be obviated through the resolution of unsettled issues of Puerto Rico law, those needs would be best served by dismissing the present case without prejudice. *See id.*

Although the court has decided to abstain at this time, the Land Trust will have "an adequate and fair opportunity to have their federal claims heard." *Pustell*, 18 F.3d at 55 n.7 (citing *Gibson v. Berryhill*, 411 U.S. 564 (1973)). The Land Trust "may choose to present all claims in state court; alternatively, they may reserve federal constitutional claims for adjudication in federal court." *Id.* (citing *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 421-22 (1964)). If the Land Trust reserves its federal constitutional claims, it "may file a petition to reinstate proceedings in this case" upon the resolution of unsettled of issues of Puerto Rico law by the Puerto Rico courts. *See id.*; *Rivera Vazquez*, 220 F.Supp.2d at 99.[4]

CONCLUSION

For the reasons expressed above, the Court **DISMISSES** plaintiff's claims **WITHOUT PREJUDICE**. Given that all claims in the complaint have been dismissed without prejudice, defendants'

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[4] Rather than being considered a new filing, this petition shall relate back to the filing date of the present complaint. *See Rivera Vazquez*, 220 F.Supp.2d at 99.

dispositive motions (Docket Nos. 61, 65, 71, 76, 78) are hereby deemed **MOOT**. All other motions pending resolution are also deemed **MOOT**.

IT IS SO ORDERED.

San Juan, Puerto Rico, November 10, 2009.

s/ Francisco A. Besosa
FRANCISCO A. BESOSA
UNITED STATES DISTRICT JUDGE

Appendix C

No. 09-2569

UNITED STATES COURT OF APPEALS

For the First Circuit

FIDEICOMISO DE LA TIERRA DEL CANO MARTIN PENA,

PLAINTIFF - APPELLANT,

v.

LUIS FORTUNO, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO; ANTONIO M. SAGARDIA-DE-JESUS, IN HIS OFFICIAL CAPACITY AS SECRETARY OF JUSTICE OF THE COMMONWEALTH OF PUERTO RICO; MUNICIPALITY OF SAN JUAN; JORGE SANTINI, IN HIS OFFICIAL CAPACITY AS THE MAYOR OF THE MUNICIPALITY OF SAN JUAN; AUTORIDAD DE ENERGIA ELECTRIC, DE PUERTO RICO (ACE); AUTORIDAD DE CARRETERAS; ADMINISTRACION DE CORRECCION Y REHABILITACION, TERRENOS

DEFENDANTS - APPELLEES

Before

Lynch, Chief Judge,
Torruella, Boudin, Lipez
Howard and Thompson,
Circuit Judges.

ORDER OF COURT

Entered June 3, 2010

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

/s/ Margaret Carter, Clerk

cc: Eliezer Alberto Aldarondo-Lopez
Eliezer Aldarondo-Ortiz
Claudio Aliff-Ortiz
Francisco J. Amundaray-Rodriguez
Judith Berkan
Carlos Enrique Cardona Fernandez
Raul Castellanos-Malave
Orlando Duran Medero
Michael Craig McCall
Mary Jo Mendez-Vilella
Miguel Pagan
Eric R. Ronda-Del Toro
Angel E. Rotger-Sabat
Pedro L. Saade-Llorens
Juan B. Soto-Balbas

Appendix D

H. B. 4916)

(NO. 489)

(Approved September 24, 2004)

AN ACT

To adopt the "Martín Peña Canal Special Planning District Integrated Development Act;" to create the Martín Peña Canal ENLACE Project Corporation and the Office of the Project, as well as a Land Trust; to provide for its existence, administration and financing; to appropriate funds and for other related purposes.

STATEMENT OF MOTIVES

The Legislature, on the basis of the public policy of the Commonwealth of Puerto Rico, which states that community development, should be spearheaded by the members of the communities thereof, hereby establishes a mechanism whose purpose is to articulate the implementation of the Martín Peña Canal ENLACE Project efficiently, providing for the effective participation of the community-based organizations that represent the residents of the communities involved in all instances of the decision-making process.

The rehabilitation of Martín Peña Canal and the communities settled along its banks is one of the most transcendental projects to be undertaken by the

Government of Puerto Rico at the onset of the 21st Century. This body of water, which flows east to west through the heart of San Juan, is a vital component of the San Juan Bay Estuary, one of the Metropolitan Area's most important natural resources.

In mid-20th Century, the Canal and the wetlands related thereto were the recipients of the wave of migrant workers displaced from the rural areas of the Island who settled along its banks in search of better living conditions. The spontaneous occupation of these lands, which constitute such an important mangrove swamp system, was made possible through the deposit of landfill consisting of debris and solid residue, over which thousands of structures were built. As a consequence, this unplanned urbanization process of the sector has produced the environmental degradation of the Martín Peña Canal and the San Juan Bay Estuary, causing the reduction of the canal and increasing the risk of floods.

Due to the impact on some portions of the land formerly occupied by the mangrove swamp, restoration to its natural state is considered to be technically irreversible. Approximately 30,000 persons reside in these lands in the communities of *Barrio* Obrero, *Barrio* Obrero-Marina, Buena Vista-Santurce, Stop 27, Las Monjas, Buena Vista-Hato Rey, Israel-Bitumul and the Cantera Peninsula, which constitute communities of irreplaceable importance for the city. They are significant sources of skilled labor for the city's construction and

services sectors. Their buying power supports many of the city's small businesses, which in turn are an important source of employment therein. Above all, they are centers of recognized importance to the Island's social and cultural creative process and endeavor. In spite of the fact that their labor participation rate as well as their levels of employment are higher than those of the rest of Puerto Rico, the income of these families is below poverty level in a larger proportion than that of the residents of San Juan and the rest of the Island. For more than 40 years, there have been innumerable proposals directed toward displacing these communities from their strategic location.

In addition, for several decades, the Government of Puerto Rico and the Municipal Government of San Juan conducted various processes for granting and recognizing the ownership titles of many residents who occupied land-filled areas in the Martín Peña Canal. Some of these residents are uncertain about the validity of these titles, since the procedures the government conducted did not meet all of the requirements of law for their recognition and formal registration by means of deeds in the Property Registry. The legal standing of these procedures for granting ownership titles must be clarified and resolved in a definite and firm manner for the peace of mind and well-being of the families of the District, and also to provide alternatives to prevent the long term involuntary displacement of the communities.

The Government of Puerto Rico, together with the United States Army Corps of Engineers, is promoting a Martín Peña Canal dredging and canalization project, which shall allow the restoration of the flow and reflow capacity of the Canal's waters, reestablishing the connection of the San José Lagoon and San Juan Bay. The development of this project shall require the relocation of a substantial number of families that currently live under precarious conditions. The environment is polluted due to the lack of infrastructure, which negatively affects the health of the population. For these reasons, the rehabilitation of the Martín Peña Canal and its neighboring communities is one of the prioritary Strategic Projects to be developed by the Government of Puerto Rico, which has been designated as the Martín Peña Canal ENLACE Project.

The Government of Puerto Rico intends to rehabilitate and revitalize this district, protecting the permanence of these communities that constitute a vital thread in the cultural, social and economic fabric of San Juan and of the entire Island, while creating the conditions for integrating them into the urban fabric of the city, offering its residents a dignified life and the appropriate environmental conditions for fosterimg the rehabilitation of the San Juan Bay Estuary.

The Martín Peña Canal ENLACE Project has been under the direction of the Department of Transportation and Public Works and the Highways and Transportation Authority since late 2001. On

May 17, 2002, by means of a Resolution, the Planning Board designated the Special Planning District of the Martín Peña Canal, which consists of the communities of *Barrio* Obrero, *Barrio* Obrero-Marina, Buena Vista-Santurce, Stop 27, Las Monjas, Buena Vista-Hato Rey, and Israel-Bitumul, delegating to the Highways and Transportation Authority the development of a Special Land Use Plan. Previously, in 1992, legislation was approved to create the Company for the Integrated Development of the Cantera Peninsula with the responsibility of leading the integrated development of this community by means of a pioneer model based upon self-management and community empowerment. Both initiatives are complementary and necessary for handling the situation of environmental degradation of the Canal.

The Government of Puerto Rico has already invested resources for contracting studies to comply with the applicable environmental legislation for the project to dredge to the Canal, in the preparation of the Land Use Plan, and in the development of an Integrated Development Plan. Both plans have been fashioned as corrective action plans against the situation of environmental degradation and pollution, the vulnerability to natural and anthropogenic hazards, and the limitations of the social and economic structure that perpetuate poverty. It has also invested in the development of infrastructure projects, the creation of programs to make citizen participation feasible, and the development of related activities, such as the

superficial cleanup of the Canal, among others. It is equally necessary to protect the experience of more than two years of work and citizen participation that constitute a self-management and empowerment effort of the seven communities that constitute the Special Planning District of the Martín Peña Canal, in close coordination and participation with the Cantera Peninsula. These communities have an Office of Citizen Participation for the ENLACE Project within the District that fosters their active presence in the planning and rehabilitation processes of the area. The community-based organizations in these communities have joined forces and constituted the *Grupo de las Ocho Comunidades* (the G-8), Inc., in order to participate in these procedures in a more effective manner, and attend to the challenges and opportunities they share.

To guarantee the effective administration of the several initiatives and projects within the Special Planning District of the Martín Peña Canal, an entity must be created, whose mission shall be to implement the public policy of the Government regarding the development of the Martín Peña Canal ENLACE Project and the neighboring communities. It is also necessary to provide said entity with a clear mandate that allows the latter to carry out fully its task of promoting self-management and socio-economic development in an agile, transparent manner free from political-partisan interference.

The Legislature hereby creates the Martín Peña Canal ENLACE Project Corporation as the

entity legally responsible for the coordination and implementation of all stages of the Martín Peña Canal ENLACE Project, which include the implementation of the Integrated Development Plan and the Land Use Plan for the Special District of the Martín Peña Canal in the housing, urban development, infrastructure and socio-economic development areas, and all projects related to the dredging and canalization of said body of water, as well as the development of community initiatives that promote social, economic and cultural development.

This corporation shall be responsible for the coordination of Government efforts and citizen participation in order to train, promote, grant incentives and create the necessary mechanisms to give continuity to the ENLACE Project and achieve its goals. This Act establishes the public policy to direct the procedures for the relocation of families and attending to the prevailing lack of ownership titles in the area, as well as the mechanisms that shall allow for the minimization of the involuntary displacement of the communities. This Act also creates the necessary mechanisms for the short and long term financing of the projects and programs that are included in the Integrated Development Plan and the Land Use Plan, and gives the new entity the authority to carry these out thus fostering the principle of community self-management and empowerment that makes the residents the central hub of the planning, renewal and development activities within their community. The Legislature

also intends to promote alliances among the communities, the public sector, and the private entrepreneurial and nonprofit sectors that make the socio-economic development of the target sector of the Project possible in such a manner that it becomes a model of integrated action that incorporates the capability and will of the communities to work on the solution of their problems.

Even more importantly, through the approval of this bill, the Legislature creates a mechanism to strengthen citizen participation so that the community may see its capabilities and aspirations channeled in order to achieve unity and consensus over the protection of its rights. These rights entail the corresponding duties and responsibilities as individuals and communities to collaborate toward the common good which shall result in a better quality of life. With this motivation in mind, this measure provides that the Corporation shall be directed by a Board of Directors with active representation of the residents of the Special Planning District of the Martín Peña Canal.

To guarantee the effective implementation of the public policy stated herein, this measure grants to the Corporation the appropriate financial capability to achieve its purposes. The Corporation is hereby authorized to appropriate recurring funds from other agencies, municipalities, the Federal Government, public corporations and instrumentalities of the Government of the Commonwealth of Puerto Rico, and persons and entities from the private sector in order to defray

part of its financial operations. Furthermore, in agreement with its own juridical personality, the Corporation is hereby endowed with the authority to acquire personal and real property and to dispose thereof in agreement with the general purposes of this Act. Likewise, the Secretary of the Treasury is hereby authorized to receive donations for the Corporation from the taxpayers, a task which he/she shall notify to the taxpayers through the media that he/she deems appropriate.

BE IT ENACTED BY THE LEGISLATURE OF PUERTO RICO:

Section 1.- Short Title

This Act shall be known by the Short Title "Martín Peña Canal Special Planning District Integrated Development Act."

Section 2.- The following words and terms, when used or referred to in this Act shall have the meaning stated hereinbelow, unless another meaning clearly arises from the context:

(a) "Public Agency" is any department, board, commission, division, office, bureau, administration, public corporation or subsidiary thereof, municipality, municipal corporation, or consortium, or instrumentality of the Commonwealth of Puerto Rico, including any of its officers, employees

or members who act or appear to act in the discharge of their official duties.

(b) "Social Capital" is the set of rules of trust, values, attitudes and networks between persons and institutions in a community that define the degree of interrelations between the different social actors and facilitate collective and cooperative activities.

(c) "Community Economic Development" is a process through which the conditions that allow the empowerment of community residents are created so that the latter may develop the material and social mechanisms to permanently promote their economic and social well-being.

(d) "District" is the "Martín Peña Canal Special Planning District" as designated by the Planning Board Resolution of May 17, 2002. The District includes the following seven (7) communities: (1) *Barrio* Obrero (West and San Ciprián), (2) *Barrio* Obrero-Marina, (3) Buena Vista-Santurce, (4) Stop 27, (5) Las Monjas, (6) Buena Vista-Hato Rey and (7) Israel-Bitumul, as delimited by Planning Board Resolution. The Planning Board may modify the referred Resolution by means of an amendment adopted pursuant to its

Organic Act and the Uniform Administrative Procedures Act, and after holding public hearings, but the exclusion of any of the aforementioned communities shall require legislative authorization by means of an amendment to this Act. The community of Cantera is not part of the District, but it shall participate and benefit from this Act pursuant to its specific provisions included hereinafter, including representation in the G 8.

(e) "Joint Venture" is an enterprise or entrepreneurial activity in which residents of the District and the Cantera Peninsula and external entrepreneurs or investors participate. The alliances may be of partnerships in a single business, alliances between preexisting businesses, or alliances created to attend to particular needs. Said ventures shall have self-management, empowerment and community development among their principles, and therefore, control thereof shall eventually be in the hands of the residents themselves.

(f) "Community Enterprise" is an enterprise whose owners are bona fide residents of the District and the Cantera Peninsula, or which is under the control of the bona fide residents of

the District and the Cantera Peninsula. In the case of joint ventures or enterprises, those in which the community partners, whether natural or juridical persons, have control over the venture or enterprise are considered to be community enterprises. In case that the community partners temporarily transfer said control in exchange for other concessions and advantages, said transfer of control shall never exceed twice the time it takes the enterprise to recover the investment of the external partners; said term shall never exceed ten (10) years.

(g) "Private Entity" means any association, organization, institute or natural or juridical person that lends, offers or renders any service or activity, or that manages any program that tends to the needs of the community.

(h) "Land Trust" means the "Martín Peña Canal Land Trust," which is created by this Act.

(i) "Conservation Strip" means the wetlands conservation and mitigation strip which shall be created along both banks of the Martín Peña Canal.

(j) "The G-8" is "*Grupo de las Ocho Comunidades*" [Group of the Eight Communities], an entity that groups the community based leadership of the communities that constitute the District and the Cantera Peninsula, as this organization has been incorporated in the Department of State.

(k) "The Corporation" is the Martín Peña Canal ENLACE Project Corporation created by virtue of this Act.

(l) "The Board" is the Board of Directors and the body that governs the Martín Peña Canal ENLACE Project Corporation created by virtue of this Act.

(m) "ENLACE Project" is the "Martín Peña Canal ENLACE Project," as designated by the Department of Transportation and Public Works with respect to the rehabilitation of the Martín Peña Canal.

(n) "Register of Bidders" is the "Register of Enterprises and Bidders of the Martín Peña Canal," created by virtue of this Act.

(o) "Register of Residents and Businesses" is the "Register of Residents, Businesses and Nonprofit Organizations of the

"Martín Peña Canal Special Planning District" created by virtue of this Act.

(p) "Peripheral thoroughfare" is the vehicular, pedestrian and cyclist transportation corridor parallel to the conservation strip, separating the construction space of the communities from the natural space.

Section 3.- Public Policy

It shall be the public policy of the Commonwealth of Puerto Rico to give priority attention to the environmental restoration of the Martín Peña Canal and to rehabilitate and revitalize the communities along its north and south banks in order to promote a healthy relationship between the natural environment and its surrounding city and communities, with a vision of integrated development based on community empowerment. The vision set forth by the communities surrounding the Martín Peña Canal of having "A united, safe and prosperous community, a model of self-managerial coexistence in the heart of San Juan is hereby adopted." This project designated as the Martín Peña Canal ENLACE Project has the following purposes:

Environmental: To enable the rehabilitation of the San Juan Bay Estuary, improve the quality of its waters and the habitat of its fauna and wildlife by broadening and dredging of the Martín Peña Canal and a conservation strip along both banks thereof.

Socio-economic: To improve the living conditions of the approximately thirty thousand (30,000) residents of the eight communities located along both sides of the Canal in the areas of public sanitation, housing, ordinance and quality of the urban spaces and the infrastructure. To achieve a healthy and enriching relationship between the communities of the sector and their urban surroundings, the recovery of the potential for tourism, recreation and education of the Canal, and the participation of the current residents in the new employment opportunities, development of businesses, and the increase in land value that shall be created through the rehabilitation and reform of the area.

Institutional: To promote civic and democratic development through the active participation of the residents in the planning and rehabilitation processes of the area.

It shall be the public policy of the Commonwealth of Puerto Rico to promote the on-site rehabilitation and revitalization of the eight communities that constitute the District and the Cantera Peninsula and to foster an integrated community development spearheaded by the members of the communities themselves. It shall also be the policy of the Government to harmonize the components of the ENLACE Project through the full participation of all the residents of the District in coordination with the G-8.

The intervention model fostered by this Government is based on the following principles:

1. Community self-management and empowerment whereby the resident is the core of the planning, renewal and development activities.

2. The alliance between the communities, the public and private nonprofit sectors, and the private entrepreneurial sector assuming the various responsibilities in order to foster development.

3. An integrated approach directed toward the poverty problem which fosters the processes for community economic development and the development of the community social capital needed to forge a better quality of life, along with the processes for physical and environmental rehabilitation.

4. To watch over and promote a culture of conservation, sensitivity and respect toward the Matín Peña Canal ecological resource, as a component of a highly important natural resource, to wit, the San Juan Bay Estuary.

5. To maximize the possibilities of relocating within the District itself those residents who must be relocated and who wish to remain in the District,

as a result of the implementation of the ENLACE Project. This includes, but is not limited to, the identification and protection by the residents and the Government of all available land and space in order to make possible the relocation of residents affected by the dredging of the Canal and the works of infrastructure within the communities themselves.

6. To ensure that the economic opportunities generated by the public investments in the District lead to more community empowerment and the improvement of the economic situation and quality of life of the residents therein.

7. To make certain that the interventions of the Corporation, public agencies and private businesses are directed toward maintaining and strengthening community cohesion and that they do not propitiate, directly or indirectly, the elimination of the communities that constitute the District.

8. To foster the development of the community's social capital wherewithal, including the provision for continued training of community leaders and the establishment of collaboration and union ties among the communities that

constitute the District and the Cantera Peninsula through community organization.

9. To capitalize on the potential of the investment of public funds for the creation of job sources and entrepreneurial activities among District residents.

10. The long term minimization of involuntary community displacement.

11. To provide for resident participation in the economic development and the increase in land value that shall arise from public and private investments in the District.

12. To promote the integration of the communities into the urban, economic and social development of the San Juan Metropolitan Area.

With the application of these principles to the intervention processes, we shall achieve, in a joint effort, the rehabilitation of the Martín Peña Canal and the revitalization of its surrounding communities, social justice and economic development for the residents of these communities and society in general and the achievement of the Martín Peña Canal ENLACE Project's fundamental and interrelated goals.

Section 4.- Creation of the Martín Peña Canal ENLACE Project Corporation

The Martín Peña Canal ENLACE Project Corporation, hereinafter, "the Corporation," is hereby created as a juridical entity independent and separate from its officers and from any other public agency or government instrumentality, and from the Municipality of San Juan. This public corporation shall exist for a term of twenty (20) years, which may be extended for five (5) additional years by means of an Executive Order of the Governor; at the end of which it shall cease to exist. Once this term ends, the Legislature shall determine the procedures for the liquidation of the assets of the Corporation. Notwithstanding the above, as holder of the debt, the Corporation shall enjoy all the necessary powers to honor the same and to maintain its to here existence until its debt, of whatever type, is totally settled. The Corporation shall have the financial and operational capabilities needed to implement the public policy established in this Act and shall be governed by a Board of Directors in order to comply with the goals, duties, functions and prerogatives entrusted thereto, all of which shall operate on behalf of the public interest and benefit. In the discharge of its duties and functions, the Corporation shall serve the interests of society in general, ensuring that the present and future interests of the communities that constitute the District are taken care of adequately. Thus, the expression of public interest arising from the decisions of the Commonwealth and the Corporation in particular, shall legitimately

represent the general interest. The Corporation shall be excluded from the application of Act No. 5 of October 14, 1975, as amended, the Puerto Rico Public Service Personnel Act, and Act No. 164 of June 23, 1974, as amended, known as the "General Services Administration Act." The Corporation's Personnel Regulations shall guarantee the effectiveness of the principle of merit in the Corporation's personnel system.

The Corporation shall have the following objectives, among others:

1. To be the entity responsible for coordinating the implementation of all aspects of the ENLACE Project; including, without being limited to, housing development, infrastructure, the dredging and canalization of the Canal, as well as urban and socio-economic development. It may implement related projects and programs, contract third parties to develop them and coordinate with the public agencies for projects and programs within the District.

2. To guarantee mechanisms for citizen participation in the planning and execution of the ENLACE Project and promote community empowerment, leadership training and strengthening of the community-based organizations. To provide technical support when

necessary, and keep the residents and merchants informed about the development of the ENLACE Project and the participation mechanisms.

3. To promote the creation of strategic alliances with the private entrepreneurial sector and with bona fide nonprofit organizations.

4. To promote the greatest participation of the private sector in the development of the ENLACE Project, for which it shall stimulate investments, industrial and commercial development, individual and the collective citizen and business initiatives of the District and the Puerto Rican community in general.

5. To promote and make possible and empower the creation, improvement and strengthening of District and Cantera Peninsula resident enterprises and businesses located therein. To promote the contracting and subcontracting of community-based organizations, including community enterprises that meet the requirements and are able to execute programs and projects related to the ENLACE Project.

6. To guarantee the continuing participation of the citizens in the decision-making process and the

planning and execution of the ENLACE Project to allow the long term permanence of the communities that constitute the District, as well as fair and equal treatment in the family relocation processes needed to implement the project.

7. To carry out its duties as it achieves its full development, with trained personnel and a reduced structure, so that it does not lose its nature as an agile and efficient coordinating entity and does not become a heavy bureaucratic apparatus.

8. To seek innovative and assertive means for financing the development of the ENLACE Project, combining public and private resources toward such purposes.

9. To coordinate the appropriate attention toward the land ownership rights situation, according to the provisions set forth in this Act.

Section 5.- Board of Directors

(1) The Board of Directors of the Corporation shall consist of a minimum of eleven (11) persons of proven capability and leadership, of which six (6) shall be appointed by the Governor and five (5) by the Mayor of the City of

San Juan. Two (2) of the members appointed by the Governor and one (1) of the members appointed by the Mayor shall be appointed for four years; two (2) of the members appointed by the Governor and two (2) of the members appointed by the Mayor shall be appointed for five (5) years and two (2) of the members appointed by the Governor and two (2) of the members appointed by the Mayor shall be appointed for six (6) years; their successors and all additional members shall be appointed for six (6) years. By recommendation of the Board, the members may be increased up to fifteen (15), in which case the participation of community representatives shall be, as a minimum, forty-five (45) percent of the membership. One half of the new appointments shall be made by the Governor and the other half by the Mayor of San Juan. The members shall remain in office until their successors are appointed and take office. In case of a vacancy, prior to the expiration of the term of the incumbent, a successor shall be appointed for the remainder of said term. The initial members of the Board of Directors shall be appointed within a term of not more than forty-five (45) days after this Act is approved.

(2) The Board of Directors shall elect a Chairperson from among its members and appoint a Secretary of Records from among the personnel of the Corporation. No person shall remain in office as Executive Director of the Corporation or as Chairperson of the Board of Directors for a consecutive term of more than ten (10) years. The quorum for holding meetings and voting shall be the absolute majority of the existing positions.

(3) Members of the Board of Directors shall not receive compensation. The expenses they incur in the discharge of their duties shall be reimbursed pursuant to the regulations adopted by the Board of Directors. Members of the Board of Directors shall be governed by the Ethics in Government Act of the Commonwealth of Puerto Rico, but shall not be compelled to render the financial reports required by said Act, with the exception of public officers that are appointed to the Board, who are already required to render such reports, in which case they shall continue to be required to render them.

(4) Five (5) members of the Board of Directors (two (2) of the members appointed by the Governor and three (3) of the members appointed by the

Mayor), shall be residents of the communities that constitute the District or the Cantera Peninsula, and shall originate from three candidates that shall be nominated by the G-8 for each position. The community representatives must have been bona fide residents of the District or the Cantera Peninsula for a term of not less than (3) years prior to their appointment and shall not have held or sought to hold any elective public office for an equal term. While members of the Board, they shall not hold or seek any elective public office, and shall remain residents of the District or the Cantera Peninsula.

(5) Three (3) members of the Board of Directors (two (2) of the members appointed by the Governor and one (1) appointed by the Mayor), shall represent the private sector, at least one of them preferably from the private nonprofit sector. Private sector representatives may not hold or seek any elective public office during the years in which they are members of the Board, nor have any conflict of interests with the ENLACE Project. They shall have, among other things, social recognition for their past performance in the execution of programs and

projects tangential to the goals of the ENLACE Project, knowledge of, or familiarity with, the ENLACE Project and its implications, and demonstrate sensibility toward community development processes.

(6) Three (3) members of the Board of Directors (two (2) appointed by the Governor and one (1) appointed by the Mayor), shall represent the public sector, and may delegate their participation, with voice and vote, to capable representatives, who shall answer directly to the members for whom they stand in. Those representing the public sector shall have the following characteristics:

a. Knowledge of, or familiarity with, the ENLACE Project and its implications.

b. To be in a position, and have the authority, to make decisions and establish commitments on behalf of the central Government or the municipality, whichever may apply.

c. To be able to coordinate with the corresponding public agencies of the central Government or the

Municipality those actions that require the intervention thereof.

d. To be knowledgeable about governmental structure and institutional processes.

e. Must not be a candidate to any public elective office during the years of membership.

f. Must be sensible with respect to community development processes.

g. Must have academic studies or experience in one or more of the following areas as relevant to the implementation of the ENLACE Project: socio-economic development, urban development, environmental management and conservation, housing development, and planning.

(7) The members of the Board of Directors may be removed by the Governor or by the Mayor of San Juan, as the case may be, according to the source of their appointment, for just cause after charges preferred and the opportunity to be heard.

(8) The Board of Directors shall have the following responsibilities:

(a) To be responsible for the achievement of the objectives of the Corporation;

(b) To supervise the proper operations of the Corporation;

(c) To approve and adopt bylaws to govern the work, deliberations and execution of its functions in accordance with the provisions of this Act;

(d) To appoint an Executive Director of the Corporation and to appoint or authorize the appointment of its other officers and employees;

(e) To ensure through creative operating procedures that the primary responsibility for the success of the Martín Peña Canal development project considered in this Act falls upon the private sector, jointly with the public sector, and the communities that constitute the District;

(f) To manage the Fund for the Development of the Martín Peña

Canal ENLACE Project, created in Section 26 of this Act.

Section 6.- Powers

The Corporation shall have all the rights, powers and prerogatives provided by this Act or by the laws or programs whose administration or implementation is delegated in order to comply adequately with the public policy established herein, including, without limitation:

(a) To adopt its corporate seal;

(b) To sue and be sued;

(c) To execute any kinds of acts and contracts and agreements, including those related to goods and services;

(ch) To acquire and transfer property to any title;

(d) To acquire, build, improve, operate and maintain projects within the Special Planning District of the Martín Peña Canal, as well as any property related to such projects;

(e) To have officers and employees;

(f) To establish regulations for its organization and operations;

(g) To receive the services of the employees of public agencies, with the consent of said public agencies, to carry out any study, investigation or activity of the Corporation that is necessary or convenient for compliance with the purposes of this Act;

(h) To receive and accept funds and donations from any public agency of the Government of Puerto Rico, the Government of the United States of America, municipalities and nonprofit entities in order to achieve the purposes of this chapter and comply with the terms and requirements with respect to any funds or donations received;

(i) To procure and obtain from the public agencies any technical and financial assistance of any nature that it deems necessary in order to fulfill the functions of the Corporation;

(j) To have exclusive control over its property and activities and to decide the nature of and need for all its expenditures, and the manner in which they shall be incurred, authorized and paid;

(k) To establish the fees and charges to be collected for the use of the property it owns;

(l) To create by resolution the subsidiaries it deems convenient to carry out any of its functions, in the manner provided below;

(m) To lend or donate money to its subsidiaries and to purchase and sell or exchange stock, bonds or other obligations thereof;

(n) To lend money, with a secured mortgage, under the terms it deems convenient, to any developer that is organized to carry out developments in the District;

(o) To borrow money for any of its corporate goals, including, without limitation, the purpose to consolidate, reconsolidate, purchase, pay or cancel any outstanding bonds or other obligations issued or assumed by it, whose principal and interest are payable in whole or in part from the revenues of the corporate entity;

(p) To provide financial assistance of any kind, including incentives and subsidies or technical assistance to carry out developments in the District;

(q) To sell or discount, in public or private transactions, mortgages or other valuable titles under its control;

(r) To manage any of its projects in the manner to be determined by regulations, including, without it being understood as a limitation, the rental of housing or businesses units, placing them under a trust, and lending them for use under any title;

(s) To participate jointly with the public agencies and the residents of the District in the coordination of initiatives in the District;

(t) To participate jointly with the public agencies and the residents of the District in planning the integrated development of the lands that constitute the District, in accordance with the provisions of the laws and regulations in effect;

(u) To enter, with prior permission of its owners, holders or representatives, any lands, bodies of water or property in order to carry out measuring, surveys or studies for the purposes of this Act, and if the owners, holders or representatives, refuse to grant their permission to enter the lands, bodies of water or property for the aforementioned purposes, any judge of the Court of First Instance shall issue an order to authorize this, upon presentation of a sworn statement

declaring the Corporation's intention of entering the lands, bodies of water or property described in the sworn statement, for the purposes stated in this provision and in the case that no known owners, holders or representatives appear, the Corporation, through its officers or employees, may enter without any permission;

(v) To carry out all actions or do all things necessary or convenient to execute the powers conferred upon the Corporation by this Act or by any other law of the Puerto Rico Legislature, exercising its public and essential government functions with respect to the integrated development of the ENLACE Project and in joint participation with other public agencies in the coordination of efforts made with respect to such development, for which the execution of the powers and faculties conferred thereto by this Act shall at no time have the effect of vesting the Corporation with the characteristics of a private entity;

(w) To participate in the planning, design and construction of the buildings, works, structures, infrastructure and others necessary for the integrated development of the ENLACE Project;

(x) To solicit, accept and obtain any funds, donations, usufruct, trusts or technical or economic assistance from the federal government, the government of the Commonwealth, including its instrumentalities and political subdivisions, or from private sources, in order to carry out the purposes of the Corporation and the purposes provided in this Act; to sponsor projects initiated under federal laws or programs; to act as a delegating or delegatory agency; and to supervise the use of the funds thus obtained;

(y) To issue and sell participating bonds as a method for raising funds for the Corporation, which shall be sold among the communities and private enterprises, and the returns of which, in interest, shall be exempted from the payment of income tax and all types of taxation.

Notwithstanding the aforementioned in this Section, the actions carried out by the Corporation, or any other office or instrumentality created pursuant to this Act, may not be in contravention to the public policy of the Government of the Commonwealth of Puerto Rico, its offices, public agencies, instrumentalities or public corporations, as provided by law.

Section 7.- Exemptions

The Corporation or any of its subsidiaries, shall be exempted from all types of taxes, duties, imposts, excise taxes or fees, including those levied or to be levied on permits, by the Commonwealth of Puerto Rico or any political subdivision thereof, including all its operations, personal or real property, and its capital, income and surplus.

The Corporation and its subsidiaries shall also be exempted from the payment of all types of duties or imposts required by law for the prosecution of legal proceedings, the issue of certifications in the offices and dependencies of the Government of the Commonwealth of Puerto Rico and its political subdivisions and for executing public documents and their registration in any public register in Puerto Rico.

Furthermore, private sector juridical or natural persons whose main activity is the development, management or operation of projects that further the goals established in the Land Use Plan and the Martín Peña Canal Special Planning District Integrated Development Plan, as specified by the Corporation, shall be exempted from all types of taxes, duties, imposts, excise taxes or fees, including those levied or to be levied on permits, by the Commonwealth of Puerto Rico or any political subdivision thereof, on all its operations, personal or real property, and its capital, income and surplus, as provided in the dispensation executed to such effects by the Secretary of the Treasury of the Commonwealth of Puerto Rico. It is clearly established herein that such projects shall be

exclusively of a social nature in order to promote the rehabilitation of the District. The Board of Directors of the Corporation shall issue an official certification identifying the project as eligible for exemption by virtue of this provision. The exemption provided in this paragraph shall be limited to the property, capital, income or surplus generated by or used in the project identified in the Corporation's certification. Juridical or natural persons who benefit from the exemption provided herein may only claim the portion of the exemption corresponding to their participation in the project. The Secretary of the Treasury shall establish by means of regulations, the procedure to request the certification pursuant to this paragraph, as well as the criteria to be considered to determine whether an applicant qualifies for the benefits established in this paragraph. Said regulations shall be approved within not more than one hundred (100) days after the appointment of the initial members of the Board of Directors. The exemptions provided in this Section shall be reviewed every three (3) years in terms of their cost-effectiveness. The Department of the Treasury shall perform the evaluation, in consultation with the Corporation, and with the collaboration of the Office of Management and Budget, the Municipality of San Juan, the Municipal Revenues Collection Center and all other public agencies involved.

Section 8.- Funds, Disbursements

All the monies of the Corporation shall be entrusted to recognized depositaries of the funds of

the Government of the Commonwealth of Puerto Rico. The accounts shall be registered in the name of the Corporation. Disbursements shall be made according to the norms and regulations of the Corporation.

Section 9.- Accounting System

The Corporation shall establish an accounting system that includes internal and external audits for the adequate control and register of all its operations. The Corporation's accounts shall be kept in such a manner that they may be itemized by activity.

Section 10.- Debts and Obligations

The debts and obligations of the Corporation shall not be debts and obligations of the Commonwealth of Puerto Rico or its political subdivisions, except that the Commonwealth Government may assume, endorse, reinforce, guarantee or otherwise assume responsibility or answer for debts of the Corporation arising from lines of credit granted or awarded by the Government Development Bank or any other public or private entity.

To maintain a sound administration and for the Government Development Bank to maintain its supervision of loan margins and fiscal health, the Corporation is hereby compelled to remit annual financial statements to the Government Development Bank, as well as any other document

that the Government Development Bank deems necessary.

Section 11.- Immunity, Limitations of Civil Liability

Neither the Corporation nor its members as individuals shall incur financial liability for any action taken in the discharge of their powers, provided that their actions have not been intentional, illegal, for self-benefit or knowingly damaging.

Section 12.- Support from the Commonwealth Public Agencies

The public agencies of the Commonwealth of Puerto Rico are hereby directed to offer support and cooperation to the Corporation, including the special assignment of personnel and the transfer of resources and property deemed pertinent. The Corporation may hire personnel regularly employed in any public agency, department, instrumentality, public or municipal corporation, municipality, municipal consortium, or political or administrative subdivision of Puerto Rico, subject to the consent of the corresponding appointing authority, to render services outside of their workday, without being subject to what is otherwise provided in the Political Code of Puerto Rico.

All public agencies of the Commonwealth of Puerto Rico shall contribute to the development of their corresponding projects and programs identified in the Integrated Development Plan and the Land

Use Plan of the District to make viable the implementation of the ENLACE Project, and shall collaborate with and support the activities, initiatives and projects furthered by the Corporation, according to their responsibilities, functions and capabilities, and in close coordination with the Corporation. In the preparation of their Capital Improvements Program, the public agencies shall include their corresponding projects and programs out of those identified in the Integrated Development Plan and the Land Use Plan of the District, whose development is directed through this Act, according to their possibilities and the priorities to be established in coordination with the Corporation.

The public agencies of the Commonwealth of Puerto Rico shall favor, facilitate and empower the creation, improvement and strengthening of enterprises and businesses of residents of the District and the Cantera Peninsula, that are located therein. They shall also encourage consultants and contractors in charge of the development of programs and projects to employ residents of the District and the Cantera Peninsula and/or to subcontract community enterprises to perform the work for which they are qualified, using mechanisms such as adjusting the execution of programs and projects to a scale that favors the participation of these enterprises. To achieve the self-management, empowerment and community development goals stated in the statement of public policy of this Act, the public agencies that develop projects and programs in the District and the Cantera Peninsula

shall resort, as a first option, to the Registry of Bidders which shall be kept by the Corporation, as provided by this Act. Whenever possible, the execution of the programs and projects shall be adjusts to a scale that furthers the participation of community enterprises through contracts or subcontracts. In case the project cannot be divided or its scale adjusted, then it shall be required to include provisions to ensure that the resources and enterprises in the Register of Bidders are considered by the contracted firms as a first option for the works or services to be subcontracted in the contracts that are to be awarded for works and services to be provided in the District and the Cantera Peninsula.

The Company for the Integrated Development of the Cantera Peninsula shall be covered by the provisions in this Section.

Section 13.- Support from the Municipality of San Juan

The Municipality of San Juan shall give support and cooperation to the Corporation, including the special assignment of personnel and the transfer of equipment, funds and property. It shall promote the contracting of community-based organizations, including community enterprises that meet the requirements established in this Act, and the applicable regulations or laws, and which are capable of executing the programs and projects related to the ENLACE Project, among others. It shall also encourage consultants and contractors in charge of the development of programs and projects

to employ residents of the District and the Cantera Peninsula and/or to subcontract community enterprises to perform the work for which they are prepared, using mechanisms such as adjusting the execution of programs and projects to a scale that favors the participation of these enterprises. In the development of projects and programs in the District and the Cantera Peninsula, the Municipality shall resort, as a first option, to the Registry of Bidders which shall be kept by the Corporation, as provided by this Act. Whenever possible, the execution of the programs and projects shall adjust to a scale that furthers the participation of community enterprises through contracts or subcontracts. In case the project cannot be divided or its scale adjusted, then it shall be required to include provisions to ensure that the resources and enterprises in the Register of Bidders are considered by the contracted firms as a first option for the works or services to be subcontracted in the contracts that are to be awarded for works and services to be provided in the District and the Cantera Peninsula.

Any municipal officials or employees transferred or appointed to a position in the Corporation shall maintain the status and rights they had at the time of joining the service of the Corporation pursuant to the personnel laws in effect and shall also maintain any right to which they are entitled in any retirement system or pension fund prescribed by law for officers and employees holding similar positions in the Municipal Government.

Section 14.- Land Use Plan and Integrated Development Plan

The Highway and Transportation Authority shall draft a Special Land Use Plan and an Integrated Development Plan for the Special Planning District of the Martín Peña Canal, as designated by the Planning Board's Resolution of May 17, 2002, taking into consideration the conservation easements and natural reserves established in the District. The plans shall be made by using a participative planning methodology, as provided in said Resolution, and shall include the environmental assessments required by the Environmental Public Policy Act. The Authority shall submit both plans (jointly or separately) through the Secretary of the Department of Transportation and Public Works for simultaneous evaluations by the Planning Board and the Environmental Quality Board. The Environmental Quality Board shall determine within not more than twenty (20) days (extendable with the consent of the Planning Board in consultation with the Department and the Authority) on each Plan's compliance with the Environmental Public Policy Act and shall notify the Planning Board thereof within said term. Final approval by the Planning Board shall take place within not more than sixty (60) days after the corresponding determination is notified to the Environmental Quality Board, provided that this is a non-significant environmental impact, or any other favorable determination that applies pursuant to the Environmental Public Policy Act. The Boards shall

carry out all the joint legal processes possible to ensure a speedy evaluation of the Plans and their approval and effectiveness within not more than one hundred sixty (160) days after this Act takes effect.

Once the Planning Board adopts the Special Land Use Plan and the Integrated Development Plan, the Planning Board may exempt the Corporation from submitting particular consultations, pursuant to the provisions in said plans. The Land Use Plan shall be prepared in accordance with the Territorial Ordinance Plan of the Municipality of San Juan and shall become one of the Area Plans of said Territorial Ordinance Plan of the Municipality of San Juan. The Corporation shall take charge of the revisions to the Land Use Plan and the Integrated Development Plan that are made during their effectiveness, and shall submit the amendments to the Planning Board for its consideration and approval. When a conflict arises between any plan, regulation or norm, the governing policies and norms adopted in the Land Use Plan and the Integrated Development Plan shall prevail over any law, plan or regulation regarding the use of the land in the District, unless otherwise provided by the Planning Board for the general interest. In case any part of the Land Use Plan or the Integrated Development Plan approved by the Planning Board is contrary to any provision of the Territorial Ordinance Plan of the Municipality of San Juan, the Corporation shall notify the Planning Board thereof so that the latter, with prior consultation with the Municipality, may approve and indicate the

modifications to said Ordinance Plan. The Board shall make said modifications in accordance with the provisions of its Organic Act, the Autonomous Municipalities Act and the Uniform Administrative Procedures Act, but the approval and effectiveness of the modifications to the Ordinance Plan shall not delay the effectiveness of the Plans for the District.

Any authorization, permit or endorsement (including any variations and exceptions to the norms) of the public agencies, especially of the Regulations and Permits Administration, the Municipality of San Juan (including, without limitation, its Territorial Ordinance and Permits Offices), the Departments of Transportation and Public Works and Natural and Environmental Resources, the Environmental Quality Board and the Planning Board (including, without limitation, site or location consultations) in the District shall only be granted when they are in accordance with the provisions of the Land Use and Integrated Development Plans of the District. The corresponding public agency shall consult the Corporation in writing on its position with respect to the proposed action, and whether or not the Corporation endorses the action and the conditions that the Corporation deems reasonable in order to proceed with the action. The Corporation shall have a term of twenty (20) days (extendable only with the consent of the corresponding public agency) to provide its comments in writing, and if no comments are provided, it shall be understood that the Corporation has no interest in stating its position.

Section 15.- Company for the Development of the Cantera Peninsula

The Corporation and the Company for the Development of the Cantera Peninsula shall coordinate the works, in order to advance the common goal of achieving the dredging and canalization of the Martín Peña Canal.

Section 16.- Transfer of Lands

The public agencies, as defined in this Act, that manage, hold in custody, have dominion over, lease or own lands in the District shall be understood through this Act as having transferred the respective title to the Corporation after one hundred sixty (160) days as of the effectiveness thereof. In the case of lands of public domain or patrimony, the ownership rights thereof through this Act shall remain vested upon the Corporation, with the exceptions established below with respect to the Maritime-Terrestrial Zone.

Section 17.- Maritime-Terrestrial Zone

The Secretary of the Department of Natural and Environmental Resources, pursuant to Sections 5(h) and 6(c) of the Organic Act of the Department of Natural and Environmental Resources (Act No. 23 of June 20, 1972, as amended), shall carry out within or before ninety (90) days as of the date of approval of this Act, an official delimitation of all public domain lands related to the maritime-terrestrial zone of the District. In the graphic depiction of said delimitation,

the Secretary of the Department of Natural and Environmental Resources shall show the alignment projected by the United States Army Corps of Engineers for the construction of the Martín Peña Canal, including the corresponding surveillance and salvage easements established by the corresponding provisions in effect of the "*Ley de Puertos para la Isla de Puerto Rico de 1886*" [Puerto Rico Ports Act of 1886], as well as the Conservation Strip determined in the Land Use Plan adopted by the Planning Board for this Project. The Conservation Strip shall take into account the natural reserves and conservation easements previously established in the District. Once this official delimitation and the graphics established in this Section are carried out, all the lands north and south of the delimitation line of the Conservation Strip shall be declared patrimony of the Commonwealth under the ownership rights of the Corporation. It shall be understood that as of one hundred sixty (160) days after this Act takes effect, the lands over which the exercise of the granting of titles to the Corporation, whether registered or not, has not been performed, shall be transferred thereto. The Corporation shall create the Land Trust with these transferred lands, as provided by this Act, which it shall manage on behalf of the communities of the District, as provided in the Integrated Development Plan and the Land Use Plan of the District. The canal to be built, as well as the surveillance and salvage easements and conservation strip, shall be kept as public domain property under the custody and administration of the Secretary of

the Department of Natural and Environmental Resources.

Section 18.- Ownership Rights

The Department of Housing, with the advice of the Department of Natural and Environmental Resources, shall conduct the corresponding legal procedures to evaluate, recognize and, wherever necessary and convenient, to provide for the registration of the ownership rights of the residents of the communities of the District, not later than one year after this Act is approved. The Department of Housing shall conduct a study on the legal situation of the rights attributable to all District residents whose dwellings are located within the lands defined as public domain in accordance with the delimitation required in Sections 16 and 17 of this Act. This title search shall serve as the basis for establishing the procedures for the recognition of ownership rights of the families that shall be relocated as part of the implementation of the ENLACE Project, including the dredging and canalization project of the Canal and the implementation of the Land Use Plan and the Integrated Development Plan of the District.

Section 19.- Martín Peña Canal Land Trust

The Martín Peña Canal Land Trust, hereinafter the "Land Trust," is hereby created, which shall consist of all the lands transferred to the Corporation, in accordance with this Act, especially pursuant to Sections 16 and 17 herein, of which the Trust shall be the custodian. The Corporation shall

prepare regulations to govern the operations of the Land Trust within one hundred (100) days after the appointment of the members of the Board of Directors of the Corporation. Said regulations shall specify the manner in which the lands of the Land Trust shall be used and the participation of the Corporation and all other public and private entities in the process of identification of the lands eligible to become a part of the Land Trust. It shall also specify the mechanisms for the appointment of the members of the Board of Trustees of the Land Trust.

The Board of Trustees of the Land Trust shall function as the fiduciary agent of the Trust. This shall not impede the transfer of the custody of the entrusted property to any Trust institution incorporated under the laws of the Commonwealth of Puerto Rico, which shall act as custodian of said property and its returns under terms that are compatible with the goals and provisions of this Act. The Board of Trustees shall have the faculties and powers expressly conferred to trustees in Sections 834 to 874, inclusive, of the Civil Code of Puerto Rico. The Land Trust is hereby created with independent juridical personality, and its Board of Directors shall have representation of the residents delegated by the G-8. The funds of the Land Trust shall be kept separately from other funds under the custody of the Corporation and maintained where the Board of Directors of the Trust so determines, pursuant to the faculties granted through this Act and the regulatory provisions adopted pursuant thereto. The Land Trust shall have the ownership rights to the land, and may

only sell or transfer the construction rights; or long term leases may be granted with inheritance rights. The owners of property on lands of the Trust may own the structure exclusively, but not the land on which it is built. The residents of the lands owned by the Trust shall be the trustees.

(a) The Land Trust shall have the following goals:

(1) To contribute toward the solution of the ownership rights problem of many District residents through collective land-holding.

(2) To handle the physical or economic displacement of the low income residents that arises from the urban reconstruction projects with fairness, avoiding the disintegration and displacement of the community.

(3) To guarantee affordable housing in the District.

(4) To acquire and possess lands on behalf of the community, thus increasing local control over the land and avoiding absentee owner decision-making.

(5) To make possible the participation of the residents and

the strategic investment of the private sector, and redistribute with fairness the increase in land value through the participating bonds mechanism, diversifying the sources of income of the families and reinvesting in the District.

(6) To make possible the reconstruction and valuation of the urban spaces, pursuant to the public policy established by this Act, and the development and use of land plans adopted by the Planning Board for the District.

(7) To recover the investment of the Commonwealth in the urban reconstruction of the District to create a revolving fund that allows reinvestment in the District or in other locations with similar purposes.

(b) To comply with these goals, the Trust may:

(1) Make the parceling convenient to the general interest in accordance with the Land Use Plan and the Integrated Development Plan, and impose restricting conditions when necessary.

(2) Acquire empty lots and lands in order to build affordable housing, whether through the public nuisance process or through eminent domain.

(3) Acquire ruined structures and debris to build affordable housing, whether through the public nuisance process or through eminent domain.

(4) Acquire the public land in the District by means of ownership transfer from the public entity to the Land Trust for the purpose of carrying out the Integrated Development Plan.

(5) Acquire the easement lands and all the remnants produced by urban improvements.

(6) Acquire by means of ownership transfer the lands and lots of public origin determined by the study directed in Section 16 of this Act and to protect the patrimonial property of Puerto Rico in the District.

(7) Ensure that all the lands of the Land Trust are registered or submitted to the corresponding

Property Register, and prepare the necessary documents such as the registration blueprints.

(8) Effectively manage the lands with fairness on behalf of the residents of the District.

(9) Render annual reports and all the documents required by the Commonwealth for corporations.

(10) Appraise the land at the time of its transfer or acquisition and authorize, subscribe and issue participation bonds on the land value to the Commonwealth, based upon the public investment in the improvements; to the citizens by means of the exchange of their land by shares, in accordance to its weighted average value by equity criteria or its contribution to the planned development; and to other residents by means of payment plans to be compensated with the interest corresponding to the participation bonds issued. These shares shall be granted in accordance with their weighted average value by equity criteria. The Land Trust may also grant participation bonds to individual

non-resident citizens and entrepreneurs for their investment and contribution to the planned development. Part of the returns on the public sector shares shall be reinvested in the District. Bonds issued in favor of the citizens shall receive a fixed interest established according to the market rates in effect and payable as shall be provided. The Land Trust shall have preferential rights to the reacquisition of shares. There may be a limit for the transfer or negotiation of the shares among third parties. Those who own shares may use them as collateral.

The Corporation shall prepare a public report on the activities of the Land Trust every one hundred eighty (180) days as of the creation thereof. It shall indicate, among others, the financial situation of the Trust, as well as any other matter that should be made public as determined by regulation.

Section 20.- Relocation alternatives

In the process of obtaining the easements to carry out the works related to the ENLACE Project, the Corporation and/or public agency in charge of the process shall make sure it maintains the highest community cohesion, also providing for, as may be

possible, the offering of relocation alternatives within the District and the Cantera Peninsula to those families, businesses and nonprofit organizations that wish to remain within the area, as established in the Land Use Plan and the Integrated Development Plan. The relocation alternatives shall be designed with the active and appropriate participation of the citizens. The affected families shall be advised of their rights and responsibilities sensibly and sufficiently in advance, ensuring full compliance with the laws that protect them.

Section 21.- Compensation for moving and relocation for those affected by the projects in the District

In determining the benefits of relocation and moving, the Corporation or the public agency carrying out the process of property acquisition shall provide uniform treatment, so that all families, businesses and nonprofit organizations in the same situation receive similar benefits, notwithstanding the source from which the money for financing the relocation process originates. In those processes of acquisition and relocation financed with funds of the Commonwealth of Puerto Rico, within the District and the Cantera Peninsula, the occupants of the properties acquired shall be compensated pursuant to what is set forth in the "Uniform Relocation Assistance and Real Property Acquisition Policies Act" of 1970, as amended, P.L. 91-646; 42 U.S.C. 4601 et seq.

Section 22.- Register of Residents, Businesses and Nonprofit Organizations of the Special Planning District of the Martín Peña Canal

In the first one hundred twenty (120) days after the appointment of the members of the Board of Directors, the Corporation shall update the register of residents and businesses that occupy buildings in the District made by the Authority as part of the Census conducted in 2002, also adding the nonprofit organizations that occupy buildings. The intention of updating this register and its purpose shall be published in newspapers of general circulation and announced through posters and fliers. Entitled to compensation for relocation and moving, in accordance with the provisions of this Act shall be all families, businesses and nonprofit organizations that have occupied the acquired dwelling for (a) not less than one hundred eighty (180) days immediately prior to the date on which the register of families, businesses and nonprofit organizations is closed, in the case of buildings located within the Canal dredging impact zone, the conservation strip, the peripheral thoroughfare or within the street blocks; or, (b) not less than one hundred eighty (180) days immediately prior to the date on which the Corporation and/or the public agency notify the offer of fair compensation for the acquisition of the property in writing for the other buildings. The Corporation shall have access to all the information held by the Department of Transportation and Public Works and the Highway and Transportation

Authority that shall allow it to keep the Register updated.

Section 23.- Community Development

The Corporation, in coordination with the Office for Socioeconomic Financing and Self-Management, shall perform functions directed to promoting the social and economic development of the District, so that community and physical developments advance concurrently, and in accordance with the following goals:

(1) To systematically direct and use the economic activity to generate internal capacity and development in the District.

(2) To maximize the internal circulation of the income generated within the District to increase its multiplier effect and to contribute toward the accumulation of internal capital through the creation of community financing mechanisms.

(3) To provide continuing support to the integration and participation of residents in the economic activity, whether as potential entrepreneurs, operating entrepreneurs, employees or owners of capital assets.

(4) To use all types of interventions from the public and private sectors in the District in order to develop the social capital and internal institutions of the community.

To comply with these goals, the Corporation, in coordination with the Office for Socioeconomic Financing and Self-Management, shall:

(1) Support residents in their economic endeavors, by providing, among others, services such as:

a. entrepreneurial training for the establishment of profit and nonprofit resident-owned enterprises and self-employment;

b. employment training;

c. referrals to jobs and employment opportunities;

d. revolving fund for financing;

e. portfolio of contracts that provide business opportunities for resident-owned enterprises;

f. list of works, projects and programs that may be performed by community enterprises;

g. operational and administrative support for the District's enterprises;

h. orientation for housing owners;

i. mechanisms to increase the amount of resident-owned capital goods;

j. mechanisms, procedures and guidelines to define, facilitate and supplement the establishment of joint ventures in the District.

(2) Support the development of the community social capital assets providing, among others, services such as:

a. support and coordination of efforts for consolidating and strengthening community-based organizations and the G-8, including leadership training and the creation of support networks;

b. the creation of formal and informal instances and spaces for the residents to share and interact;

c. the design and implementation of mechanisms to support the

development of a culture of appreciation and attachment toward the community;

d. the creation of community support networks for individuals, families, and the elderly who are affected by the Project or who have special needs;

e. the design and implementation of a system of indicators to evaluate the public, environmental, economic and social health in the District.

Section 24.- The Register of Businesses and Bidders of the Martín Peña Canal

The Corporation shall prepare the Register of Businesses and Bidders of the Martín Peña Canal in the first one hundred sixty (160) days after the appointment of the initial members of the Board of Directors. Said Register of Bidders shall include all the community enterprises operating under the provisions of the applicable laws and regulations. The Register of Bidders shall be updated at least once each year.

Section 25.- Creation of the Office of the Martín Peña Canal ENLACE Project

It is hereby directed to create the Office of the Martín Peña Canal ENLACE Project in the

Department of Transportation and Public Works and the Highway and Transportation Authority as the entity responsible for the coordination and implementation of all the stages of the ENLACE Project. The office of the ENLACE Project shall be in effect, operationally, until all the processes of transition, creation and operations of the Corporation are completed.

Section 26.- Fund for the Development of the Martín Peña Canal ENLACE Project

A capital fund is hereby created for investments in and the development of the District, with no restrictions on the nature of the projects established by Act No. 3 of October 8, 1987. The fund shall receive appropriations from the Government of the Commonwealth, other public funds, including, among others, capital improvements, other state, federal and municipal funds, public corporations, departments and other public instrumentalities appropriated or obtained thereto, and from contributions made thereto by private sector individuals and entities. This fund shall be administered by the Board of Directors of the Corporation, which may solicit, accept and receive capitalization contributions donated thereto and may also receive capitalization funds from any natural or juridical person, and any private or government entity, that are covered into the Fund. The Board of Directors shall render a report on the uses and projects carried out with said funds to the Governor and to both Legislative Chambers on or before March 31 of each year.

The Office of Management and Budget is hereby directed to transfer to the Fund the full amount of items budgeted for the development of the ENLACE Project appropriated to the public agencies (as defined in this Act, except for the municipalities. The Highway and Transportation Authority is hereby authorized to transfer to the Fund the budgeted items intended for the development of the ENLACE Project.

Annual recurring appropriations to be charged against the General Fund shall be appropriated to the Fund for the Development of the Martín Peña Canal ENLACE Project, which shall be made in accordance with the work plan and budget presented by the Corporation and to the extent that the Corporation justifies the use of the monies from year to year. Said appropriations shall be contemplated in the General Expense Budget of the Government.

The full amount of the monies covered into the Fund shall be used for the purposes provided by this Act.

Section 27.- Tax Incentives

The following tax benefits shall be granted to the entities that contribute to the Corporation and the Fund for the Development of the Martín Peña Canal ENLACE Project:

(a) All donations made to the Corporation shall be treated as donations made to educational entities, pursuant to Act

No. 120 of October 31, 1994, as amended, for purposes of the limitations on donations;

(b) Interest generated by the bonds issued by the Corporation shall be exempted from the income tax levied by Act No. 120 of October 31, 1994, as amended;

(c) The accelerated depreciation method shall be allowed for the recovery of the cost of the investment;

(d) Every business or industry established or to be established in the District shall be entitled to an additional deduction for the salaries paid for purposes of the calculation of the income tax equal to five (5) percent of the applicable minimum salary of each new job created after the approval of this Act. This deduction shall be in addition to any other granted by any law and shall extend for a term of five (5) years.

To be entitled to the deduction granted by this subsection, it shall be necessary that the newly created job:

(1) does not eliminate or substitute any job that existed prior to the approval of this Act;

(2) is a full-time job of not less than thirty-five (35) hours per week; and

(3) is held by a District resident for a continuous term of not less than six (6) months within the taxable year, except for those businesses or industries that, due to their nature, are seasonal or temporary.

These tax incentives shall be evaluated every three (3) years as of the date of effectiveness of this Act in terms of cost-effectiveness. The evaluation shall be made by the Department of the Treasury, in consultation with the Corporation and with the collaboration of the Office of Management and Budget, the Municipality of San Juan, the Municipal Revenues Collection Center and all other public agencies concerned.

Section 28.- Bonds

In addition to the powers granted to the Corporation by this Act,

(a) The Corporation is hereby authorized to issue bonds from time to time for the amounts of principal that in the judgment of the Corporation are necessary to provide sufficient financial resources for the total or partial payment of the cost of any project or projects; for the payment of the interest on bonds of the Corporation for the

period it determines; for the creation of reserves to guarantee said bonds, and for the payment of other expenses of the Corporation, including the costs of the project that are incidental, necessary or convenient to carry out its purposes or exert its corporate powers, with the exception of the regular operational expenses of the Corporation. Bonds issued by the Corporation may be payable from the total amount or a part of the gross or net income and other income derived by the Corporation under the clauses of a financing contract with regard to any project, all as provided in the Trust contract whereby the issue of bonds is authorized. The principal and interest on bonds issued by the Corporation may be guaranteed through the total lien or a part of any income of the Corporation and may be guaranteed by the assignment of any financing contract with regard to any project or part thereof. The resolution or resolutions authorizing the issuing of bonds or the Trust contract guaranteeing the same may contain provisions that shall be a part of the contract with the holders of the bonds issued under said resolution or resolutions, with regard to a guarantee and the creation of a tax on the income and assets of the

Corporation; to the creation and maintenance of redemption and reserve funds; to the limitations with respect to the purposes for which the product of the bonds may be used; to limitations with respect to the issue of additional bonds; to limitations with respect to the introduction of amendments or supplements; to the resolution or resolutions or the contract of the trust; to the granting of rights, faculties and privileges and to the imposition of obligations and responsibilities upon the trustee under any trust contract; to the operation and maintenance of projects; to the fixing of fees, rent and other charges for the use and occupation of any project or its operation; to the rights, faculties, obligations and responsibilities that shall arise in the event of noncompliance with any obligation under said resolution or resolutions or the trust contract, or with respect to any rights, faculties and privileges conferred upon the holders of the bonds as guarantee thereof to increase the salability of the bonds.

(b) The bonds may be authorized by resolution or resolutions of the Corporation. They may be in one or more series, have a date or dates, become due within a term or terms that

do not exceed fifty years as of their respective dates of issue, and earn interest at a rate or rates that do not exceed the maximum rate allowed by law at that time. The bonds may be payable at a place or places, whether within or outside of the Commonwealth of Puerto Rico, of a denomination or denominations and in a form, whether coupons or registered; have register or conversion privileges; be executed in such a manner, payable by means of payment and subject to redemption terms, with or without premium; provide for the replacement of mutilated, destroyed, stolen or lost bonds; authenticated in a manner and comply with those conditions and contain those terms and conditions as the resolution or resolutions may provide. The bonds may be sold in public or private sales for the price or prices determined by the Corporation; provided, however, that the financing bonds may be sold or exchanged for outstanding Corporation bonds under the terms that, in the opinion of the Corporation, best serve its interests. Notwithstanding the form and according thereto, and in the absence of a stated disclaimer on the face of the bond to notify that it is not negotiable, all the bonds of the Corporation,

including any coupons pertaining thereto, shall have at all times, and it shall be understood that they have, all the characteristics and incidents (including negotiability) of negotiable instruments under the laws of the Commonwealth of Puerto Rico.

(c) The proceeds of the sale of the bonds of each issue shall be used to defray the cost of the project or projects or a part or parts thereof, for which the aforementioned bonds have been issued, and shall be disbursed in the form and under the restrictions, if any, that the Corporation sets forth in the Trust Contract that guarantees said bonds. If the proceeds of the bonds of any issue turns out to be less than the cost, due to any increase in construction costs or to an error in the estimates or any other reason, additional bonds may be issued in the same form to cover the amount of said deficiency, and unless otherwise provided in the Trust Contract, it shall be considered that said bonds are of the same issue and shall be paid from the same funds without giving any preference or priority to the bonds issued originally.

(d) Bonds may be issued under the provisions of this Act without obtaining consent from any department, division,

commission, board, body, bureau, or public agency of the Commonwealth of Puerto Rico, with the exception of the Government Development Bank for Puerto Rico (which shall intervene in cases in which the laws in effect expressly so provide, or at the request of the Corporation or the Trust), without any other procedure or any condition or matter other than the procedures, conditions and matters specifically required by this Act and the provisions of the resolution authorizing the issue of said bonds or the trust contract that guarantees them; Provided, however, that the provisions of Act No. 272 of May 15, 1945, as amended, shall apply.

(e) The bonds of the Corporation that are signed by the officers of the Corporation in the exercise of their office on the date of the signing thereof shall constitute valid and unavoidable obligations, even when prior to the delivery and payment of such bonds any or all of the officers whose signatures or facsimiles of signatures appear thereon have ceased to be officers of the Corporation. The validity of the authorization and issue of the bonds shall not depend upon or be in any way affected by any procedure concerning the construction, acquisition, extension or improvement of the project

for which the bonds are issued, or by any contract entered into with respect to said project. Any trust contract that guarantees the bonds may provide for any of said bonds to include an annotation stating that it was issued pursuant to the provisions of this Act and any bond that includes said annotation under the authority of such trust contract shall be considered to be final, valid and issued in accordance with the provisions of the Law. Neither the Corporation nor any person executing the bonds shall incur personal liability for such bonds, nor shall they be subject to any civil liability for the issue of said bonds. The Corporation is hereby authorized to purchase any outstanding bonds issued or assumed by it with any funds available for such purpose.

Section 29.- Trust Contract

At the Corporation's discretion, any bonds issued under the provisions of this Act may be guaranteed by a trust contract by and between the Corporation and a corporate trustee, which may be a Trust Corporation (trust company) or a banking institution with the faculties of a Trust Corporation (trust company) within or outside of the Commonwealth of Puerto Rico.

It shall be legal for any banking institution or trust corporation incorporated under the laws of the Commonwealth of Puerto Rico, the United States of America or any state of the United States of America to act as depositary of the proceeds of the bonds, income or other monies to execute indemnity bonds or to offer as guarantee the securities required by the Corporation. In addition to the above, the trust contract may contain all the provisions that the Corporation deems reasonable and appropriate for the security of the bondholders.

Section 30.- Agreement of the Commonwealth of Puerto Rico with the Bondholders

The Commonwealth of Puerto Rico hereby agrees with the holders of any bonds issued under this Act and with the persons or entities that establish contracts with the Corporation in accordance with the provisions of this Act, that it shall not limit or alter the rights herein conferred onto the Corporation until said bonds and the interest thereon are totally paid off and said contracts are totally complied with and executed by the Corporation; provided, however, that none of the provisions herein shall affect or alter said limitation if adequate measures for the protection of said bondholders of the Corporation or those who have entered into such contracts with the Corporation are provided by law. The Corporation, as agent of the Commonwealth of Puerto Rico, is hereby authorized to include this agreement by the Commonwealth in the aforementioned bonds or contracts. However, nothing established in this Section shall have the

effect of altering what is provided in Section 10, which sets forth that the debts and obligations of the Corporation shall not be debts or obligations of the Commonwealth of Puerto Rico nor of its political subdivisions, nor shall they have the effect of encumbering the loan margin of the Commonwealth of Puerto Rico.

Section 31.- Income of the Corporation

The fees, rent, charges and all other income earned by the Corporation from the project related to the bonds of any issue, except for the part that may be necessary for paying the costs of the Corporation incurred in said project and to provide reserves, if any, that may be provided in the trust contract that guarantees said bonds, shall be deposited regularly in a reserve fund for the payment of the debt service, as provided in the trust contract, which is hereby offered to guarantee the payment of the principal and interest on said bonds as they become due and the call price or purchase price of bonds withdrawn due to redemption or purchase, as provided. The guarantee shall be valid and binding from the time in which it is constituted. The fees, rent, charges and other income and monies offered in guarantee and those received afterwards by the Corporation shall immediately be subject to lien without the need to physically deliver them or the need for any other act, and said lien shall be valid and binding and shall prevail against any third party that holds any kind of claim against the Corporation for damages or breach of contract or any other reason, regardless of whether or not said third party has been notified of

this matter. Neither the trust contract nor the financing contract for which a collateralization agreement is formalized or for which the rights of the Corporation over any income are assigned, need to be filed or registered to finalize the lien over the same against any third party, except in the files of the Corporation. The use and disposition of the monies to the credit of the redemption fund for the payment of the debt service shall be subject to the provisions of such a trust contract. The referred redemption fund for the payment of the debt service shall be a fund for such bonds without distinction or priority of one over the other, unless otherwise provided in the trust contract.

Section 32.- Commonwealth of Puerto Rico and its Subdivisions Are Not Liable

Bonds issued by the Corporation shall not constitute a debt of the Commonwealth of Puerto Rico or any of its political subdivisions, nor shall the Commonwealth of Puerto Rico or any of its political subdivisions be liable therefor, and such bonds shall only be payable from funds that have been encumbered for their payment, unless the Commonwealth or any of its public agencies otherwise participate as guarantors.

Section 33.- Transfer of Property from the Government to the Corporation

The Commonwealth of Puerto Rico, its public agencies, public corporations and political subdivisions, including the municipalities, are

hereby authorized to assign and transfer to the Corporation, at its request and under reasonable terms and conditions, without the need for calling a public bid or other formalities of law in addition to the execution of the corresponding deed, any property or interest over the same (including property that is already dedicated to public use), that the Corporation deems necessary or convenient in order to carry out its purposes.

In accordance to the provisions in this section, the deed to any property of the Commonwealth of Puerto Rico, including the deed to any property that is subsequently acquired, may be transferred to the Corporation by the officer in charge of said property or who has it under its jurisdiction. The Secretary of Transportation and Public Works shall transfer to the Corporation, free of any charge, those additional lands of the Commonwealth of Puerto Rico that, in the judgment of the Governor of Puerto Rico, said Corporation needs in order to achieve its goals and purposes.

These provisions shall not be construed in the sense of authorizing the assignment or transfer of property set aside for other purposes by express legislative provision.

The Secretary of Transportation and Public Works, the Secretary of Housing and the Mayor of San Juan shall submit to the Legislature in March of each year a listing of all the properties assigned and transferred to the Corporation by virtue of the

authorization herein contained and the appraisal of each property.

Section 34.- Transfer of Personnel

The Corporation herein created shall have the condition of excluded for purposes of Act No. 5 of October 14, 1975, as amended, the "Puerto Rico Public Service Personnel Act."

Any Commonwealth officers or employees who are appointed to fill a position in the Corporation shall retain the status and rights they had at the time of joining the service of the Corporation pursuant to the personnel legislation in effect and shall also retain any rights they held in any retirement system or pension fund prescribed by the law for officers and employees that hold similar positions in the Government of the Commonwealth.

Section 35.- Transition Committee

The Secretary of the Department of Transportation and Public Works and the Board of the Corporation shall appoint a Transition Committee responsible for adopting the necessary measures for the transfer to the Corporation of the functions of the Department of Transportation and Public Works and the Highway and Transportation Authority with regard to the ENLACE Project.

This Committee shall supervise the adequate transfer to the Corporation of all matters under the administration and responsibility of the Department

of Transportation and Public Works, without interrupting the administrative processes or the rendering of services and operations of said Department. This Committee shall cease operations when so determined by the Secretary of the Department of Transportation and Public Works and the Board.

Section 36.- Transfers

Not later than sixty (60) days as of the appointment of the members of the Board of Directors, the Corporation shall submit to the Office of Management and Budget an application and a budget draft for the surplus of the current fiscal year at the time this Act takes effect. Once this budget is approved by the Office of Management and Budget and by the Board of Directors, the Department of Transportation and Public Works and the Highway and Transportation Authority shall transfer to the Corporation the programs, funds, obligations, property, equipment, records, files and any others related to the functions for the development of the District.

Not later than ninety (90) days as of the appointment of the members of the Board of Directors, all the powers, functions and obligations conferred by law or regulation onto the Department of Transportation and Public Works and the Highway and Transportation Authority with respect to the development of the District shall be transferred to the Corporation. The transfers provided in this subsection shall be carried out

without being subject to the prohibitions for election years contained within any of the laws in effect.

Section 37.- Injunction

No injunction shall be issued to hinder the application of this Act or any part thereof.

Section 38.- Reports

The Corporation, through the Board of Directors, shall render an annual report on March 31 to the Governor, both Houses of the Legislature and the Mayor of San Juan with an account of the activities carried out by the Corporation during the previous fiscal year, its financial situation and the work plan for the three subsequent fiscal years. Said report shall also be submitted to the communities of the District through the representatives of the G-8.

Section 39.- Appropriations

A recurring annual amount shall be appropriated to the Corporation to carry out the purposes of this Act. Said appropriations shall be contained in the General Expense Budget of the Government.

Section 40.- Incompatibility, Separability and Interpretation

If any provision, word, sentence, subsection or section of this Act were challenged for any reason before the court and ruled unconstitutional or null,

said ruling shall not affect, prejudice or invalidate the remaining provisions of this Act.

Any provision of law or regulation that is incompatible with the provisions of this Act is hereby repealed to the extent that such incompatibility may exist.

The Statement of Motives of this Act is hereby attached thereto and made a part thereof. The provisions of this Act shall be liberally construed with the purpose of furthering the development and implementation of the public policy established in its Statement of Motives and to carry out any other purposes set forth in this Act.

Section 41.- Effectiveness

This Act shall take effect immediately after its approval.

CERTIFICATION

I hereby certify to the Secretary of State that the following Act *No. 489 (H.B. 4916)* of the 7th Session of the 14th Legislature of Puerto Rico:

AN ACT to adopt the "Martín Peña Canal Special Planning District Integrated Development Act;" to create the Martín Peña Canal ENLACE Project Corporation and the Office of the Project, as well as a Land Trust; to provide for its existence, administration and financing; to appropriate funds and for other related purposes,

has been translated from Spanish to English and that the English version is correct.

In San Juan, Puerto Rico, today 30th of April of 2007.

Francisco J. Domenech
Director

Appendix E

(H. B. 1403)

(No. 32)

(Approved June 23, 2009)

AN ACT

To amend Section 16 of Act No. 489 of September 24, 2004, known as the "Martín Peña Channel Special Planning District Integrated Development Act," to make it feasible for its provisions to be conformable to other laws, and to clarify that public domain lands shall not be transferrable.

STATEMENT OF MOTIVES

The Martín Peña Channel ENLACE Project Corporation was created through Act No. 489 of September 24, 2004, known as the "Martín Peña Channel Special Planning District Integrated Development Act."

Through the abovementioned Act, the Legislature of Puerto Rico created said Corporation as the body responsible for coordinating and implementing all phases of the Martín Peña Channel ENLACE Project, in areas such as housing, urban development, infrastructure, and socioeconomic development, and all projects related to the dredging and canalization of said body of water, as well as the

development of community initiatives that further social, economic, and cultural development.

For the implementation of the Public Policy set forth in Act No. 489, Section 16 provided that all public agencies that hold lands in the District shall be understood to have transferred the respective title to the Corporation after one hundred sixty (160) days as of the effectiveness of the Act.

It provided further that in the case of public domain or patrimonial lands, the ownership rights thereof shall be vested upon the Corporation.

Public agencies, which term includes all agencies, public corporations, and instrumentalities of the Commonwealth Government and the municipalities, may have their own objectives, purposes, and programs pursuant to the laws, regulations, and programs that apply to them.

Therefore, the amendment of Section 16 is in order so as to conform the provisions of Section 16 of Act No. 489 to other laws of which the purposes are also matters of high public interest.

Furthermore, it is necessary to amend Section 16 to suppress the reference made to public domain properties, since these are not liable to being privately owned. (Sec. 256 of the Civil Code of Puerto Rico.)

BE IT ENACTED BY THE LEGISLATURE OF PUERTO RICO:

Section 1.- Section 16 of Act No. 489 of September 24, 2004, is hereby amended to read as follows:

"Section 16.—Transfer of Lands.—

The public agencies, as defined in this Act, that manage, have custody, have dominion over, lease or own lands in the District may transfer the respective title deed to the Corporation, insofar as such transfer does not contravene any legislation, regulations, programs, objectives, fiscal situation, and public policy considerations of the Public Agency in question. In the case of public domain or patrimonial lands, the ownership thereof shall be vested upon the Corporation, insofar as such ownership does not contravene any legislation, regulations, programs or objectives of the Public Agency having custody of said public domain lands, with the exceptions established below with respect to the Maritime-Terrestrial Zone.

Any property the title of which belongs to the Municipality of San Juan shall keep its title unaltered.

In the event that the Corporation or Trust created by virtue of this Act has attempted to register or has registered any Municipal property under its name, such registration shall be hereby revoked and rendered ineffective, and the title shall

be reverted to the Municipality of San Juan immediately.

Any property that is not registered under the name of the Municipality of San Juan, but that is being used, maintained, operated and/or that contains buildings and/or structures of the Municipality of San Juan to render services of any kind such as sports, community, health, educational, and others, of which the title belongs to any instrumentality of the Executive Branch, Departments, Agencies, Corporations or Dependencies, shall transfer such titles to the Municipality of San Juan, provided, that the latter had been using them and that the same shall continue, as expressly directed by the law, to render the same services they presently render to the community and any other service that the Municipality of San Juan decides to render in them. The Municipality shall not dispose of the same without first offering the transfer of the title to the Government instrumentality which originally held the title thereof, except when having received a waiver from said agency to sell.

The properties of the Commonwealth of Puerto Rico shall be assessed and evaluated by the dependencies holding the titles thereof in order to determine whether these shall remain the property of such dependencies or whether, in their judgment and pursuant to the applicable laws and regulations, these shall be transferred by such agency; provided, that such action does not deprive citizens from essential services rendered therein.

Any of these properties that have been transferred to the Corporation or Trust shall be reverted to the Original Agency or title holder to continue with the abovementioned legal process.

Any private or individual title holder who holds the title at the time of the approval of this Act shall retain the same; however, he/she may assign, sell, transfer, or convey the same voluntarily.

Any person who by virtue of this Act may be entitled to receive a title and qualifies therefor, shall be evaluated and granted such title individually for the nominal value of one dollar. For such purposes, the Municipality of San Juan, in coordination with the department, agency, corporation or dependency of the Executive Branch holding the title of such property, shall carry out, at their own expense, any necessary study, evaluation and "as built" plan, so that, once the process is completed and the resident is qualified, the department, agency, corporation or dependency of the Executive Branch holding the title of such property shall execute the deed assigning the title individually to each one of them. The new title holder, by virtue of this process, may not transfer the property for ten (10) years.

In the event that a person who is granted the title of a property resolves to sell or otherwise transfer the same on or before ten (10) years of the execution of such title, such beneficiary shall reimburse the Municipality of San Juan or the Agency assigning such ownership title seventy-five (75) percent of the value of the lot at the time of the

sale or transfer. The following shall be understood to be included in the term sale or transfer: Sale, Exchange, Liens, Mortgage, or Collateral Security. The 75% reimbursement shall be made at the time of the execution of the deed, as appropriate.

The beneficiary may be exempted from compliance with the restrictions set forth above, which shall require a certification by the Secretary of the Department of Housing. Said certification shall attest compliance with any of the following circumstances: 1) divorce, when one of the parties assigns his/her participation in the lot to the other party, who shall acquire the corresponding part of the lot under the same restrictions as the assigning spouse and shall be bound to comply with the same, as stipulated in their divorce, without any monetary compensation or goods in return; 2) inheritance, if the property is acquired by the owner of the probate estate, who bequeaths the same to his/her heirs and legatees, who shall acquire the lot under the same restrictions as the testator and shall be bound to comply with the same; 3) serious or terminal illness, as certified by a physician to such effect, insofar as due to such condition, the owner or his/her dependent living in the same lot, is compelled to sell or transfer the lot to obtain medical treatment; 4) obtain a mortgage loan to make improvements to the property without cash out; 5) these restrictions shall be extended to the legatees of the beneficiary.

In view of the fact that the property registry neither vests nor divests rights, any person who holds a valid title, whether or not such title is

recorded, shall so remain upon the approval of this Act.

Any site or land that by virtue of Act No. 489 has been registered under the Corporation or Trust shall revert to the original ownership status until every study, measures or procedures are conducted pursuant to this Act."

Section 2.- This Act shall take effect immediately after its approval; however, the effects thereof shall be retroactive to September 24, 2004.

CERTIFICATION

I hereby certify to the Secretary of State that the following Act No. 32 (H. B. 1403) of the 1st Session of the 16th Legislature of Puerto Rico:

AN ACT to amend Section 16 of Act No. 489 of September 24, 2004, known as the "Martín Peña Channel Special Planning District Integrated Development Act," to make it feasible for its provisions to be conformable to other laws, and to clarify that public domain lands shall not be transferrable.

has been translated from Spanish to English and that the English version is correct.

In San Juan, Puerto Rico, today 30th of November of 2009.

Solange I. De Lahongrais, Esq.
Director

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No. 10-576 (2)

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

FIDEICOMISO DE LA TIERRA DEL CAÑO MARTÍN PEÑA,
Petitioner,

v.

LUIS G. FORTUÑO, ANTONIO M. SAGARDIA-DE JESUS, MUNICIPALITY OF SAN JUAN, JORGE SANTINI, AUTORIDAD DE ENERGÍA ELÉCTRICA, AUTORIDAD DE CARRETERAS, ADMINISTRACIÓN DE TERRENOS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In 2004, the legislature of Puerto Rico responded to the harmful and inhumane conditions affecting thousands of individuals, the environment and society in general by enacting Law 489. Law 489 orders various public entities to undertake a series of comprehensive projects that seek environmental remediation, infrastructure development, the elimination of urban blight and slum-areas, as well as other concededly public purposes. It is undisputed that these projects will be carried out by the government in the lands at issue here. On June 23, 2009, through an amendment to one section of Law 489, which was enacted as Law 32, the legislature transferred the lands from petitioner to respondents—all public entities—to advance these goals. Petitioner conclusorily alleges to this Court that this transfer to public entities was a pretext to benefit identifiable private individuals. In transferring the lands to public entities, however, the legislature, by the very terms of the amendment, left intact the projects to be carried out in the lands, as well as the other goals of Law 489. In the courts below petitioner did not argue otherwise. Petitioner also did not argue below that the actual and primary motivation of the legislature was instead to confer direct benefits upon favored, identifiable private individuals.

The questions presented are (1) whether petitioners have properly preserved any pretext claim, and (2) whether the Court of Appeals applied the correct legal standard in rejecting the Takings Clause challenge.

PARTIES TO THE PROCEEDINGS

Petitioner is the Fideicomiso de la Tierra del Caño Martín Peña.

Respondents on whose behalf this brief is filed are: the Honorable Luis G. Fortuño, Governor of the Commonwealth of Puerto Rico, Antonio M. Sagardía, Secretary of Justice,[1] Jorge Santini, Mayor of San Juan, the Municipality of San Juan, the Puerto Rico Electric Power Authority, the Puerto Rico Highway and Transportation Authority, and the Puerto Rico Land Administration.

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[1] Mr. Sagardía has been substituted by Mr. Guillermo Somoza Colombani as Secretary of Justice of the Commonwealth of Puerto Rico.

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Singer, Norman, *Sutherland Statutory Construction*, Ch. 1A § 22:38 (6th ed.) 8, 20

IN THE

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FIDEICOMISO DE LA TIERRA DEL CAÑO MARTÍN PEÑA,

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v.

LUIS G. FORTUÑO, ANTONIO M. SAGARDIA-DE JESUS, MUNICIPALITY OF SAN JUAN, JORGE SANTINI, AUTORIDAD DE ENERGÍA ELÉCTRICA, AUTORIDAD DE CARRETERAS, ADMINISTRACIÓN DE TERRENOS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

STATEMENT

This case arises out of the effort by the legislature of the Commonwealth of Puerto Rico to address in a comprehensive and integrated manner the harmful conditions posing a direct threat to communities, the environment, and society in general. The lands at issue here originally consisted of inhabitable mangroves, swamplands and a canal located in the heart

of San Juan. Since the mid-twentieth century citizens from rural areas of Puerto Rico have periodically invaded the lands. These citizens have built settlements by filling the canal and the adjoining wetlands with trash and rubbish in order to make the terrain firm enough to support structures made of salvaged wood and corrugated tin. Through this time, the settlers have also disposed of their trash, and untreated sanitary waste in the canal and adjoining wetlands. These actions eventually lead to a state of environmental crisis, unplanned urbanization, and concededly blighted conditions. Through Law 489, the legislature authorized a comprehensive project directed towards the environmental remediation of the area, and its subsequent redevelopment. The legislature explicitly determined that the project was to be carried out by government agencies, mostly respondents, and estimated that it will last around twenty years. By way of Law 32 the legislature amended a single section of Law 489, and transferred the lands where these projects are to be carried out to respondents. Petitioner alleges that this transfer is a pretext to confer private benefit on identifiable private individuals.

As the First Circuit observed, however, the amendment, by its own terms, left intact respondents statutory obligations and the public use to be given to the lands in carrying out the projects. As that court further observed, petitioner has not alleged that through Law 32 the legislature somehow relieved respondents from their obligations or that it abandoned the objectives of Law 489. While petitioner did conclusorily argue that the effect of Law 32 would be to abandon a goal of Law 489 of trying to avoid displacement of the residents of the area, it did not argue that the legislature had

abandoned the more specific public purpose of eliminating conditions harmful to the public. Petitioner also did not allege that the actual and primary purpose of the amendment is to benefit known private individuals. Because petitioner failed to make a plausible accusation of impermissible favoritism, or to allege a plausible violation of the Public Use Clause, petitioner has not properly raised a pretext claim.

A. The Area in Question[1]

The area in question originally consisted of inhabitable mangroves, swamplands and a canal. It is located in the heart of San Juan. Since around the mid-20th century residents from rural areas of Puerto Rico have been migrating to this area. Because its natural characteristics made it impossible to support structures, the migrants made the area habitable by sinking garbage, rubbish and debris in order to make the surface firm enough to support structures eventually built with corrugated tin, salvaged wood and other inadequate materials.

Given this unplanned urbanization, sewer and storm-water systems, as well as proper roads, have never been built or assembled. Residents have therefore disposed of their trash and untreated wastewater into the canal and adjoining wetlands for decades. Most of the area is also devoid of electric power and potable water services, as well as other basic utilities.

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[1] The facts described in this section are derived from the Statement of Motives of Law 489 and other facts which are undisputed. *See* Pet App. 8a-16a, 57a-66a.

The residents are understandably well below the poverty level, and the area is concededly blighted and in a precarious infrastructural state. More importantly, the filling and dumping practices just described have led to a state of environmental crisis that poses a direct threat to the health of the residents and society in general, as well as to the entire San Juan Estuary System and other adjacent bodies of water. For example, given the massive and widespread illegal dumping practices, there has been a substantial alteration of the natural flow of the water systems that originally existed in the area. The principal effect is that in times of rain, the area floods dramatically. When floods occur, decades of contamination surface into alleys, and into people's homes and adjacent structures. These contaminants also reach waters of the United States, including the entire San Juan Bay Estuary system and its adjacent bodies of water. This, of course, exposes the environment, the communities, and society in general to harmful and extremely dangerous conditions that have a direct, detrimental effect on health and safety. It also exposes the Commonwealth to unprecedented penalties by both federal and state agencies.

B. Law 489

The legislature of the Commonwealth of Puerto Rico passed Law 489 in September 24, 2004 to respond to the harmful and inhumane conditions described above. By way of Law 489 the legislature engaged in "one of the most transcendental projects to be undertaken by the Government of Puerto Rico." Pet App. 57a-58a. The legislature recognized that "[t]he Government of Puerto Rico [under the direction of respondent Autoridad de Carreteras (Puerto Rico Highways and Transportation Authority)] has already

invested resources for contracting studies to comply with the applicable environmental legislation for the project to dredge the Canal, in the preparation of the Land Use Plan, and in the development of an Integrated Development Plan." Pet App. 61a. The legislature further recognized that both plans are "fashioned as corrective action plans against the situation of environmental degradation and pollution, the vulnerability to natural and anthropogenic hazards, and the limitations of the social and economic structure that perpetuate poverty." *Id.* 61a. Accordingly, through legislation, it created a "mechanism whose purpose is to articulate the implementtation of the Martín Peña Canal ENLACE Project efficiently [.]" *Id.* 57a.

The legislature's stated public purposes appear in Section 3 of Law 489. *See* Pet App. 70a. The more principal public purposes are "Environmental" and "Socio-economic." *Id.* 70a-71a. The legislature's "environmental" purpose specifically is "[t]o enable the rehabilitation of the San Juan Bay Estuary, improve the quality of its waters and the habitat of its fauna and wildlife by broadening and dredging of the Martín Peña Canal and conservation strip along both banks thereof." *Id.* And the "socio-economic" purpose is "[t]o improve the living conditions of the approximately thirty thousand (30,000) residents of the eight communities located along both sides of the Canal in the areas of public sanitation, housing, ordinance and quality of the urban spaces and the infrastructure. To achieve a healthy and enriching relationship between the communities of the sector and their urban surroundings, the recovery of the potential for tourism, recreation and education of the Canal[.]" Pet App. 71a.

In recognizing the hardship that the projects could cause the poor residents of the area, the legislature also adopted a policy of preventing resident dislocation. *See Id.* For example, the legislature will construe new housing facilities within the area for relocating residents. *See* 1st Cir. App. 1434.[2]

The legislature also created a public corporation to, *inter alia*, "be the entity responsible for coordinating the implementation of all aspects of the ENLACE Project; including, without being limited to, housing development, infrastructure, the dredging and canalization of the Canal, as well as urban and socio-economic development." Pet App. 76a. This public corporation is called the ENLACE Corporation.

The legislature also directed the different public agencies of the Commonwealth—primarily respondents—to "contribute to the development of their corresponding projects and programs identified in the Integrated Development Plan and the Land Use Plan of the District to make viable the implementation of the ENLACE Project," and that they "shall collaborate with and support the activities, initiatives and projects furthered by the Corporation, according to their responsibilities, functions and capabilities, and in close coordination with the Corporation." Pet. App. 94a-95a. A similar section is devoted to the Municipality of San Juan. *See Id.* 96a-97a. By way of Section 16 of Law 489 the legislature transferred to the ENLACE corporation all of the lands where the

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[2] References to the Appendix submitted in the First Circuit are cited as "1st Cir. App." followed by the page number.

projects will be carried out by respondents. *See Id.* 101a.[3]

C. The Amendment to Law 489, Law 32

On May 14, 2009, even though over four and a half years after passage of Law 489 no public work had officially begun, the ENLACE Corporation transferred all of the lands it came to own under Section 16 to petitioner. Petitioner claims to be a private entity that, as of this date, acquired private rights over these lands.[4]

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[3] The Development Plan contains essentially the same goals and objectives as the statute. Some excerpts of the plan were submitted to the courts below. *See* 1st Cir. App. 1387-1471.

[4] Although in its Statement of the Case (Pet. 3) petitioner assets—in a wholly conclusory fashion as "facts"—that it is a "private entity" which acted as "collective landowner," it fails to provide any citation of support in the record. *See* Pet. App. 18a-19a, 41a-42a. Respondents respectfully point out that it was highly disputed below both whether petitioner is a private entity or that it could acquire private, independent rights over these lands. *See Response Brief for All Appellants*, at pp. 29-86 (1st Cir. Case No. 09-2569). As to the latter, respondents argued, *inter alia*, that even assuming that petitioner was a private entity, under Puerto Rico law lands destined for public works cannot be privatized until the public work is eventually completed, or it is determined that no public work will be carried out on the plot—none of which was present here. Respondent explained to the courts below that unless such conditions are satisfied, the lands destined to a public use constitute public domain lands and cannot be privatized. *Id.* 61-62. Respondents argued that even assuming arguendo that the legislature had authorized the Corporation to eventually privatize these lands, it did not exempt it from this general rule. Respondents reasoned that, consequently, the lands could only be privatized once the public projects were completed. The First Circuit, however, assumed without deciding that petitioner was a private entity which acquired private rights over the lands on

Approximately one month later, the legislature passed Law 32. *See* Pet App. 135a. Through Law 32 the legislature recognized that in Section 16 the lands were transferred to the Corporation "for the implementation of the Public Policy set forth in act No. 489." *Id.* 136a. With this in mind, the legislature amended Section 16 and re-transferred the lands back to the public entities that originally owned them, namely respondents.[5] The amendment, however, by its own terms[6] left intact the provisions, goals and purposes of Law 489 which are to be implemented in the lands at issue. *See Id.* 137a. Respondents' statutory obligations (*Id.* 94a-97a), also remained intact. *See Id.* The legislature, moreover, recognized that "Public agencies, which term includes all agencies, public corporations and instrumentalities of the Commonwealth Government and the municipalities, may have their own objectives, purposes, and programs pursuant to the laws, regulations and programs that apply to them" which can

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May 14, 2009 in dismissing the case on the merits. *See* Pet. App. 19a-20a.

[5] Other state and federal agencies will participate in the project. These include, among others, the United States Army Corps of Engineers, pursuant to the Intergovernmental Cooperation Act, 31 U.S.C. § 6506, the Environmental Protection Agency, the Commonwealth's Department of Natural Resources, the Puerto Rico Department of Housing, and other Commonwealth utility agencies.

[6] Law 32 amended Law 489 "to read as follows." It is a widely recognized principle of statutory interpretation that "[w]hen a statute is amended 'to read as follows' or is otherwise reenacted as amended, the original act or section is merged with the amendment." *See* Singer, Norman, *Sutherland Statutory Construction*, Ch. 1A § 22:38 (6th ed.)

assist to advance the objectives as Law 489 faster and more efficiently.[7] *Id.* at 136a.

The legislature ordered respondents to, upon the transfer, "assess and evaluate[ ]...[the lands] in order to determine whether these shall remain the property of such dependencies or whether, in their judgment and pursuant to the applicable laws and regulations" these can be transferred forward, "provided, that such action does not deprive citizens from essential services." Pet App. 138a-139a. This study reflects the legislature's desire that respondents identify those plots necessary to carry out the public works mandated by Law 489 and the development plan.[8]

The amendment provides for two types of transfers. First, it states "[t]he public agencies, as defined in this Act, that manage, have custody, have dominion over, lease or own lands in the District may transfer the respective title deed to the [ENLACE] Corporation, insofar as such transfer does not contravene any legislation, regulations, programs, objectives, fiscal situation, and public policy considerations of the public Agency in question." Pet App. 137a. Second, it contemplates the possibility of eventually transferring some lands to individual residents of the area.[9]

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[7] The legislature also made abundantly clear that the amendment cannot have the effect of affecting current services to the citizens of the area.

[8] As noted above, under Puerto Rico law lands destined for public works cannot be transferred. *See* n. 3, *supra*. Thus, if a plot of land is necessary for public work it cannot be privatized and must therefore be either kept by the entity or transferred to another public entity.

[9] It is undisputed that most of the area will be directly impacted by the many projects to be carried out. *See* 1st Cir. App. 1433-1435. *See also Id.* 1205(Noting that all of the lands at

If such is the case, however, the legislature—in keeping with the legislative policy of minimizing the displacement of the residents of the area because of the redevelopment works—sought to incentivize the residents' permanence in the area by severely restricting any potential economic benefits the transferee may derive from a sale, in the event it decides to later transfer a given plot.[10]

D. The Case Resolved in the Decisions Below

1. Law 32 was signed into law by respondent Fortuño on June 23, 2009. Two days later, on June 25, 2009, petitioner brought suit in the United States District Court for the District of Puerto Rico challenging the constitutionality of the transfer of the lands to the public entities. Among other claims, in the complaint petitioner claimed that Law 32 violated the Takings Clauses of the Constitutions of the United States and Puerto Rico.

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issue are essential or "[t]he severe contamination will continue to foster.") There is, therefore, no certainty as to when the lands at issue can be transferred.

[10] Specifically, if "a person that is granted the title of a property resolves to sell or otherwise transfer the same on or before ten (10) years of the execution of such title, such beneficiary shall reimburse the Municipality of San Juan or the Agency assigning such ownership title seventy-five (75) percent of the value of the lot at the time of the sale" or transfer. Pet App. 139a-140a. A mortgage of the property is included in the term "sale." *See Id.* Nonetheless, a person "may be exempted from compliance" with these provisions if, *inter alia*, it "obtain[s] a mortgage loan to make improvements to the property without cash out." *Id.* For this—which empowers some individuals to be able to independently improve the area themselves—the individual needs to obtain a "certification" from the Department of Housing. *See Id.*

In its complaint, petitioner alleged that "[w]hile Law 489 remains in effect..., Article 16 of the Law—pursuant to which titles to land had been transferred to the Corporation in 2005 and thereafter to the Fideicomiso—was radically altered." 1st Cir. App. 13. Petitioner further alleged that "[t]he effect of the law is to abandon a development plan which has been approved and/or adopted by the...Legislature of Puerto Rico" and other state entities. Petitioner, at this time, however, did not elaborate the conclusory allegation that "the development plan...has been abandoned." Petitioner also alleged that "[t]he law contemplates the possibility of providing land titles to individuals who are to be evaluated by these government agencies, but there is no guarantee that there will be such transfers." *Id.*

On June 29, 2009, the district court *sua sponte* issued an order expressing great concern with certain jurisdictional and comity issues which it understood had to be considered prior to it taking any action in the case. *See* 1st Cir. App. 83-85. One of these issues was *Pullman* abstention. *See Id.*[11] The district court granted the parties until July 31, 2009 to brief these issues. It also granted respondents until said date to file motions to dismiss.

On July 31, 2009 respondents filed their motions to dismiss. In its motion to dismiss the Municipality noted that the amendment left intact "the provisions of Law 489, including its purpose, the policy choices and options enunciated therein" which are to be carried out in the lands at issue. 1st Cir. App. 359. The Municipality also argued that petitioner had

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[11] The Court later added one additional issue to be briefed. *See* 1st Cir. App. 176.

failed to properly plead that actual or primary purpose of the statute was not to favor identifiable individuals. *See Id.* 380-388.[12] On August 20, 2009 petitioner opposed. In its opposition petitioner framed its argument as follows: "[t]he Municipal defendants once again misconstrue the nature of plaintiff's claim, asserting that the Law 32 challenge is based on the fact that the law contemplates the possibility of providing title to unspecified individuals....With this erroneous notion as a starting point, the Municipal defendants then argue that plaintiff cannot demonstrate that any specific private individuals have been benefited by the land transfers mandated by Law 32. Plaintiff certainly is not contending that urban redevelopment projects are invalid if they ultimately may benefit some private individuals....The claim, rather is that *this particular law*, which *ipso facto* reverses property transfers which have already taken place...is unconstitutional, because it is not based on any legitimate purpose." *Id.* 908-909. Petitioner did not elaborated on what it based this conclusion.

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[12] The Municipality of San Juan also argued below that the mere fact that the legislature contemplated the possibility of eventually transferring some parcels to as yet unknown individuals and not to the trust (as an allegedly private collective holder of land)—as a mean to advance the statutory objective of preserving the communities—this does not render the statute unconstitutional. Though petitioner uses this argument to say that respondents gave inconsistent arguments below, the Court can easily assess that respondents did not argue that this was the primary or actual purpose of the statute, or that this was the only policy objective of Law 489. Respondents rather noted, time and time again, that the statute had multiple purposes which were not altered by the amendment. *See* 1st Cir. App. 359.

On November 10, 2009, the district court dismissed the complaint on *Pullman* abstention grounds. Petitioner appealed this ruling to the First Circuit on November 16, 2009. Petitioner's brief to the First Circuit barely elaborated on its takings challenge. Pet App. 55-56. But it nevertheless elaborated in what it meant by its conclusory allegation that the "effect of the amendment is to abandon [the] Development Plan." Petitioner's specific argument was that "[t]he Fideicomiso is not even *mentioned* in the Statements of Motives [of the amendment]." *Brief of Appellant* at 56 (1st Cir. Case No. 09-2569) (emphasis in original). If followed, according to petitioner, that the entity will suffer and the residents would be in danger of being displaced. *See Id.* It did not argue, however, that through the amendment Law 489's more specific purpose—eliminating conditions harmful to the public—had somehow been abandoned or will not be carried out.[13]

After oral argument was held, the court of appeals ordered the parties to file supplemental briefs on the Takings Claim. In its supplemental brief, plaintiff framed its public use challenge as follows: "whether the Government can establish Law 32's compliance with the Fifth Amendment's 'public use' requirement. It contends that Law 32 is not the sort of independent

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[13] For example, though petitioner argued in its brief to the First Circuit plead that respondent Mayor Santini, who himself is not a member of the legislature, appeared publicly declaring an intention to provide land titles to unspecified residents of the area at some unspecified moment in time, and exhorting them to cooperate with the Municipality in the studies to be conducted on the lands (*see* 1st Cir. app. 14), petitioner has not argued that Mayor Santini intends to give away lands in a way that would cause an abandonment of the governments' public purposes.

comprehensive plan that warrants deference under *Kelo*." *See Petitioner's Supplemental Brief on Remedies Available on a Takings Claim* at 4 (1st Cir. Case No. 09-2569). Petitioner again argued that the end result of Law 32 would contravene one of the goals of the plan—to avoid displacement of community residents. But again petitioner did not argue that through Law 32 the Commonwealth abandoned the projects directed to remedy conditions harmful to the public.

2. On April 28, 2010, the Court of Appeals for the First Circuit issued its opinion. *See Fideicomiso de la Tierra del Caño Martín Peña v. Fortuno*, 604 F.3d 7 (1st Cir. 2010) (Lynch, C.J.), (Pet. App. 1a). In that opinion the court of appeals directed the district court to enter judgment dismissing with prejudice all federal claims raised by petitioner, including its Takings Clause claim.[14] In so doing, the court noted that petitioner "brings an unusual Takings Clause claim." *Id.* 2a. It observed that petitioner "correctly admits" that Law 489 "serves a number of public purposes..." (*Id.* 3a), and that petitioner recognized its comprehensive character (*Id.* 15a). The court then went on to address "[t]he more specific public purposes" of the statute which, the court noted "is to remove conditions harmful to the public." *Id.* at 4a.

The court of appeals then analyzed the amendment to Law 489, Law 32. It correctly noted that "Law 32, by its terms, left intact most of the rest of Law 489, including its statement of goals and section 5048,

[14] The court of appeals also dismissed petitioner's claims under the Due Process Clause, the Contracts Clause, and the Ex Post Facto Clause for its failure to properly develop these arguments before the district court or to preserve these arguments on appeal. *See* Pet. App. 25a.

the section that created" petitioner (Pet App. 14a-15a). The court of appeals further observed that while petitioner did argue that "the end result of Law 32...will be to end community participation in the ENLACE Project, to allow public agencies to facilitate speculation by private developers, and to displace community residents", it was not arguing that Law 32 "relieves public agencies from the obligation to advance the goals of the ENLACE Project identified in Law 489." Pet. App. 20a-21a.[15]

The court of appeals went on to note that the controversies under Puerto Rico law that the district court found appropriate for the exercise of *Pullman* abstention did not have to be considered if petitioner's "'public use' argument fails." Pet. App. 19a-20a ("Irrespective of whether the Fideicomiso is, as it claims, a private owner of lands considered private property under Puerto Rican law, it cannot obtain the relief it seeks if its 'public use' argument fails.") Thus, the court of appeals entered into the merits of plaintiff's Takings claim, as petitioner had suggested in its supplemental brief. *See Plaintiff's Supplemental Brief on the Remedies Available on the Takings Claim* at 13 ("This Court has the power to [ ] decide the merits of this case at this juncture[.]")

The court of appeals recognized that the arguments made by petitioner regarding a possible displacement of community residents and reduction of community participation were "serious arguments." Pet. App 21a The court, however, concluded that because there is

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[15] In a footnote the court of appeals added that "[t]he fact that under Law 489 the land may, after improvements, be leased to private parties does not mean that Law 489 lacks a public purpose, *see Berman v. Parker*, 348 U.S. 26, 33-36 (1954), nor does the Fideicomiso so argue."

not even an allegation that the concededly public policy goals of Law 489 will not be carried out, and the amendment, on its face, reflects that these must still be carried out, "they are not grounds for a claim under the Takings Clause of the U.S. Constitution." Pet. App. 21a

Judge Torruella concurred. He wrote separately "to clarify [his] view that Law 32 pursues the public purposes of economic, social, environmental, and community redevelopment that were carefully plotted in Law 489." Pet. App. 26a.[16] Judge Torruella emphasized that "Law 32 amended *one Article of Law 489*—Article 16—and maintained Law 489's comprehensive provisions that define the policy goals behind the ENLACE Project. As the Commonwealth argues, the principles, purposes, and objectives of Law 489 are in effect." *Id.* at 31a. Judge Torruella further observed that, "[i]t is uncontested that the ENLACE project was adopted to rehabilitate and revitalize the Martín Peña Canal and its communities; it seeks to conduct extensive public works and improvements and to deal with environmental degradation, and land ownership issues." *Id.* at 32a-33a. Judge Torruella concluded that "[t]hese are public purposes that were adopted in the context of a thorough, comprehensive, and detailed development plan, that pursuant to Law 32 will be carried out

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[16] Judge Torruella outlined the issue presented to the court of appeals as the majority did. *See* Pet. App. 29a-30a ("The Fideicomiso stresses that the Government has failed to articulate a coherent and legitimate explanation of the public purposes behind Law 32. The Fideicomiso also contends that in allowing the Commonwealth to place land titles among a host of public agencies, Law 32 contravenes Law 489's goals to foster community participation, and avoid speculation and displacement of the communities.")

through the intervention and active participation of several public agencies." *Id.* at 33a. Judge Torruella, therefore, agreed with the panel.

3. Petitioner moved for rehearing or rehearing en banc. In its motion petitioner reiterated its speculative argument that Law 32 had the effect of abandoning the goal articulated in Law 489 to minimize displacement of the communities. *See Petition for Panel Rehearing and/or rehearing En Banc*, at 4-6 (1st Cir. Case No. 09-2569). As in previous filings, petitioner did not argue that the actual purpose of Law 32 is to abandon the primary public purpose of eliminating conditions harmful to society in general, or to confer benefits on specific private individuals. On June 3, 2010, the First Circuit unanimously denied the petition for rehearing or rehearing en banc. *See* Pet. App. 55a-56a.

ARGUMENT

I. THE COURT SHOULD NOT REVIEW THE QUESTION PRESENTED IN THIS CASE BECAUSE PETITIONERS DID NOT RAISE SUCH A QUESTION IN THE COURTS BELOW

1. A fundamental prerequisite of this Court's review of federal constitutional questions is that the same question have been pressed or passed on in the court below. *See Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969). That requirement has not been met in this case. Contrary to Petitioner's assertion, the federal question that petitioners now ask this court to address was not timely or properly raised in the court of appeals or in the district court.

2. A pretext is an "[o]stensible reason or motive assigned or assumed as a color or cover for the real reason or motive." *Black's Law Dictionary* 1187 (6th ed. 1990). In *Kelo v. City of New London*, this Court defined a pretextual public purpose in the Takings Clause context as being one where "the actual purpose was to bestow a private benefit on a particular private party." 454 U.S. 469, 478 (2005). *See also Id.* at 490 (Kennedy, J., concurring) ("transfers intended to confer benefits on particular, favored private entities, and with only...pretextual public benefits, are forbidden by the Public Use Clause.") Pertinent to this analysis is that where the condemnation's "actual," "direct" or "primary" purpose is to achieve a public benefit, the action at issue satisfies the Public Use Clause. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26, 30, 34 (1954); *Goldstein v. Pataki*, 516 F.3d 50, 63 (2d Cir. 2008); *cert. denied*, 554 U.S 530 (2008); *Carole Media LLC v. New Jersey Transit Corp.*, 550 F.3d 302, 311 (3rd Cir. 2008). *See also Kelo*, 454 U.S. at 500 (O'Connor, J., dissenting).[17]

To properly plead a pretext claim a plaintiff must accordingly allege sufficient facts that lend themselves to the plausible inferences that (1) the government's stated purpose is not primarily a public one, and (2) the actual purpose of the action is to impermissibly confer a private benefit on particular,

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[17] Justice O'Connor has observed that takings which "directly" achieved public benefits are, among others, those seeking the elimination of a "harmful property use." 445 U.S. at 500. *See also Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs.")

identifiable individuals. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). *See also Kelo*, 545 U.S. at 491 (Kennedy, J., concurring). Petitioner, however, has failed to meet this standard. Because petitioner cannot seek in this Court's review of a claim that was not properly presented to or ruled on by the courts below, the Court should reject that attempt.

A. Petitioner's Failure To Establish That The Concededly Public Use Of The Lands At Issue Has Been Abandoned Defeats Any Takings Claim It May Have

In considering petitioner's own admissions and pleadings the First Circuit, found that "there can be no doubt that Law 32's transfer to public ownership is for 'public use' under the Takings Clause." Pet. App. 22a-23a. In reaching this conclusion, the First Circuit properly observed that petitioner conceded that the projects to be carried out under Law 489 have a valid public purpose, that these are based on comprehensive planning, and that the lands in question are necessary to carry them out. *See* Pet. App. 3a, 15a, 21a. *See also Petition for Panel Rehearing and/or rehearing En Banc* at 4 (1st Cir. Case No. 09-2569) ("There can be no doubt that both Law 489 and the 2006 Development Plan approved pursuant thereto satisfy 'public use.' The record establishes the comprehensive nature of a plan designed to address serious infrastructure and environmental concerns of the more than 25,000 residents of the sector and to preserve community integrity and permanence."); *and* 1st Cir. App. 1205 (Noting that the lands are essential or "[t]he severe contamination will continue to foster.")

In its analysis of petitioner's claims, that court, and the concurring judge, also correctly observed that the statutory amendment in question, Law 32, by its own terms left intact all of the public purposes, projects and objectives which seek to eliminate conditions harmful to the public. *See* Pet. App. 14a-15a, 22a. *See also Id.* at 31a (Torruella, J. concurring).[18] Said court further observed that petitioner, or its part, did not plead or allege that under Law 32 the government somehow abandoned these specific projects, or that the public entities to whom the lands were transferred were otherwise exempted from carrying out the statutory goals carefully outlined in Law 489 (Pet. App. 94a-97). *Id.* at 21a.[19]

To be sure, the court of appeals correctly noted that while petitioner did conclusorily and subjectively alleged that "[t]he effect of the law is to abandon a development plan which has been approved and/or adopted by the...Legislature of Puerto Rico and other

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[18] As noted above, Law 32 amended only Section 16 of Law 489 "to read as follows." *See* n. 5, *supra*. It follows that the legislature did not relieve the public entities from carrying out their statutory obligations directed to eliminate the harmful conditions. *See Id.*

[19] The amended statute simply transferred to respondents lands on which they will carry out a comprehensive project that seeks to eliminate hazards affecting society and the environment, as well as to eradicate urban blight. It is the same as if every time a specific public project was to be carried out in the area, the agency in charge of carrying out such work condemned from petitioner each particular plot necessary for each particular work. But the legislature chose the broader approach, and the Constitution allows it. *See Berman*, 348 U.S. at 35 ("community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.")

state entities" (1st Cir. App. 13), petitioner never developed this argument to mean that the legislature abandoned the goal of eliminating conditions harmful to the public in the lands at issue. *See* Pet. App. 20a-21a ("[T]he Fideicomiso further argues [that] Law 32's alleged confiscation and transfer of lands to public agencies bears no reasonable relationship to any possible legitimate purpose. This is so not least because Law 32, in the Fideicomiso's view, relieves public agencies from the obligation to advance the goals of the ENLACE Project identified in Law 489. These goals in Law 489 are indisputably public purposes."). Petitioner rather developed the argument as follows:

> "Law 32 deprives a single entity of its assets, preventing it from carrying out its very purpose....The Fideicomiso would cease to exist, and its members will likely face dislocation and the dissolution of their community. ...This result would also be contrary to the purpose of the existing comprehensive plan for the District to promote economic progress while assuring against displacement of community residents."
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> *Petitioner's Supplemental Brief on the remedies Available on the takings Claim at 5.*

See also Petition for Panel Rehearing and/or rehearing En Banc at 4-6. Thus, petitioner's argument was—albeit conclusorily[20]—that the effect of Law 32

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[20] Said allegation, standing alone, is insufficient to state a claim. *See Iqbal*, 129 S.Ct. at 1951. Thus even if a pretext claim was theoretically cognizable in the face of multiple, concededly quintessential public uses, these undeveloped, speculative and wholly conclusory allegation in Petitioners' complaint could not support a claim of pretext.

would be to abandon a secondary goal of Law 489 (try to avoid displacement of the communities), not that through the amendment the legislature refrained from further carrying out the public purposes directed to eliminate the harmful conditions, or that it relieved respondents from their statutory duties (Pet. App. 94a-97a).

Accordingly, the court of appeals held that there was no objective reason to believe that the public use of these lands had ceased. More specifically, (1) as petitioner conceded that the public projects to be carried out on the lands at issue under Law 489 satisfy the Public Use Clause, (2) the amendment, by its own terms, left intact the statutory mandate—and the obligation of public entities—to carry out the projects, and (3) petitioner did not plead that through the amendment this somehow changed; the court of appeals reasoned that petitioner had failed to provide any objective, non-conclusory factual indication which would lend itself to the plausible inference that the legislature's stated purpose is not really a public one. Pet. App. 22a-23a.

This rationale shows why plaintiff has failed to present a pretext claim. As noted above, the essence of a pretext claim is that the actual or primary purpose of the taking is not a public one. Because petitioner failed to argue that the legislature's primary purpose to eliminate conditions harmful to the public has been abandoned by an amendment the facially preserves such purpose intact, there is no objective indication here on which a plausible inference may be drawn that the purpose behind the statute is not really a public one. Accordingly, a "pretext" claim has not been properly presented.

B. Petitioner's Failure To Identify Specific Private Parties Whom The Statute Is Primarily Designed To Benefit Defeats Any Pretext Claim

Notwithstanding petitioner's failure to even suggest that the amendment somehow eradicated the primary purpose of the measure—to eliminate conditions harmful to the public in these public lands—petitioner also did not affirmatively allege that the amendment was, in fact, "adopted 'to benefit a particular class of identifiable individuals,'" with incidental or no public purpose whatsoever. *Kelo*, 454 U.S. at 478 (quoting *Midkiff*, 467 U.S., at 245). *See also Id.* at 490 (Kennedy, J., concurring). Actually, petitioner admits that although the amendment "contemplates the possibility of providing land titles to individuals," these are yet "to be evaluated by [the] government agencies." *See* 1st Cir. App. 13. Thus, from the outset petitioner failed to properly present an essential element of its takings claim—identifying the specific private individuals whom a statute is primarily designed to favor. *See Kelo*, 545 U.S. at 478, n.6.

Even in this Court, petitioner does not state that the *actual and primary* purpose behind the statute is to confer private benefits. Specifically, while in this court petitioner conclusorily suggests that individuals may benefit, it has not affirmatively alleged that benefiting them is the actual purpose behind the statute. Petitioner's argument is that in its complaint (Pet. 14) it pled that the Mayor of San Juan—who is not part of the legislature—"has already appeared publicly declaring that his intention is to provide land titles to private individuals, and the Municipality has sent vehicles to the area with speakers

exhorting citizens to communicate with a Municipal agency in order to accelerate the process." 1st Cir. App. 14. Specifically, petitioner noted in the complaint that:

> The law also provides for a process whereby the Municipality of San Juan will begin to undertake studies, in conjunction with agencies of the Commonwealth..., in order to ... consider the qualification of residents to acquire land in the district. The law contemplates the possibility of providing land titles to individuals who are to be evaluated by these government agencies, *but there is no guarantee that there will be such transfers*.
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> 1st Cir. App. 13.

See also, Reply Brief of Appellant Petitioner at 43(1st Cir. Case No. 09-1911) ("The true effect of the law is to confiscate the land of the Fideicomiso, and perhaps pass it on to some individual residents[.]") But this does not mean that the *actual* purpose of the legislature was to give away the lands immediately and indiscriminately to private individuals, and to set aside the more important public purposes in Law 489.[21] This argument, moreover, fails in the face

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[21] For all purposes this reflects that the Mayor (who himself is not even a member of the legislature) was merely exhorting the residents to assist the Municipality and other agencies in studying the lands, as mandated by Law 32, but not that it was to give away the lands where public works have to be performed so as to even raise suspicion. Even if the Mayor intended to transfer lands to individual residents after the conditions harmful to the public were eliminated, moreover, this would in no way make the taking unconstitutional in light of the various, public purposes of Law 489 stated above.

of petitioner's admission below—that there is no certainty that individuals will receive even incidental benefits from the amendment. *See Id.*[22]

Accordingly, petitioner has failed to present a plausible allegation that the actual and primary purpose behind Law 32 is, in fact, to favor particular, identifiable private individuals.

C. Because Petitioner Persuaded the First Circuit to Resolve the Merits of the Case After Oral Argument The Court Should Reject its Question Presented

Petitioner's question to this Court concerns whether its alleged claim was properly "dismissed at the pleadings stage simply because the government can advance in litigation a *post hoc* purpose that appears facially valid." Pet. i. Even assuming that petitioner's claim was properly presented to the courts below, however, petitioner was afforded the opportunity to file a supplemental brief after oral argument where it could develop any argument it desired. Petitioner, nevertheless, used this opportunity to rehash its prior arguments. It also explicitly endorsed the court of appeals to resolve the case on the merits. *See Plaintiff's Supplemental Brief on the Remedies Available on the Takings Claim* at 13 ("The general rule limiting appellate jurisdiction to those matters necessary to decide the appeal is one of 'orderly judicial administration,' rather than 'jurisdiction.'... Accordingly, relief in this court is not limited to the

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[22] Petitioner has also failed to explained how statements made after the Law 32 was passed, by a person who is not even part of the legislature (the Mayor of San Juan), somehow provide insight into the intent of the legislature in enacting Law 32.

abstention decision....This Court has the power to [ ] decide the merits of this case at this juncture[.]") This goes to show that petitioner at the time understood that it had presented its case, and that there was nothing to add, even as to any possible argument made by respondents. It should not be allowed to, as it now tries to do, reverse this tactical decision by claiming that its claims were improperly dismissed on the merits at the pleadings stage.

II. THIS CASE DOES NOT PRESENT ANY QUESTION UNDER THE TAKINGS CLAUSE THAT WARRANTS THIS COURT'S REVIEW

Even if this Court were to overlook the severe problems with petitioner's presentation of its constitutional claim, it should deny review. Petitioner argues that the decision below is incorrect under *Kelo v. City of New London*, 545 U.S. 469 (2005). Petitioner also alleges that the decision conflicts with the decisions of the Court of Appeals of the District of Columbia and the State of Hawaii, and that there is general confusion among lower courts as to how to adjudicate a pretext claim. In rejecting petitioner's claim, however, the court of appeals properly applied the well-settled standards applicable to pleadings, and to Public Use challenges, which render consideration of any possible "pretext" claim unnecessary.

A. The Decision Below Does Not Conflict With this Court's Precedent

The court of appeals faithfully followed this Court's precedents in determining whether respondents had demonstrated the existence of a public use. Petitioner argues that this Court has instructed lower courts that, notwithstanding the objectively demonstrated existence of a valid public use, a Takings claim

cannot be dismissed at the pleadings stage for failure to state a claim. This Court has never so held. *See e.g., Goldstein*, 516 F.3d at 63; *Carole Media*, 550 F.3d at 311.

Petitioner's reliance on *Kelo* is misplaced. This case does not concern a project whose primary purpose is to create jobs, generate tax revenues, help "build momentum for the rehabilitation of" an area, make an area "attractive," or create leisure and recreational opportunities." *Kelo*, 545 U.S., at 474-75. Rather the primary purposes here are namely "[t]o enable the rehabilitation of the San Juan Bay Estuary, improve the quality of life of its waters and the habitat of its fauna and wildlife by broadening and dredging of the Martín Peña Canal and a conservation strip along both banks thereof." *See* Pet. App. 70. The purpose is also "[t]o improve the living conditions of the approximately thirty thousand [ ] residents of the eight communities located along both sides of the Canal in the areas of public sanitation, housing, ordinance and quality of the urban spaces and infrastructure." *Id.* at 71a. The Development Plan shows—and plaintiff admits to—the comprehensiveness of these measures and the principal purposes thereof. "The Caño's rehabilitation through dredging and channeling is the most important action and of potentially the largest environmental impact that the ENLACE Project has....Works related to the dredging and channeling of the Caño, and to the reformation of the communities (infrastructure, urban development) involve relocation of a significant amount of families." 1st Cir. App. 1434. The plan also notes that "[t]he neighboring communities...are affected by the Caño's current state, the precarious housing and infrastructure conditions...The lack of a sewer system results in high levels of pollution...Rain

episodes set off frequent floods in the Caño and the overflow of the storm sewer system, exposing the District's residents to polluted waters." *Id.* at 14 31.

In essence, the primary public purpose here is to eliminate conditions harmful to the public—a purpose which was not even present in *Kelo*. Accordingly, the particular factual rationale in *Kelo* is not applicable to the facts of this case, but rather what is applicable is the Court's long standing precedent that the elimination of conditions harmful to the public is primarily a valid prerogative of the States.[23] When such purposes are present, eight members of the *Kelo* Court were—and a firm line of precedent is—in agreement that the public use requirement is satisfied. *See Berman*, 348 U.S. at 32 ("Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs.") *See also Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting) ("The Court's holdings in *Berman* and *Midkiff* were true to the principle underlying the Public Use Clause. In both those cases, the extraordinary, pre-condemnation use of the targeted property inflicted affirmative harm on society.") Specifically, this line of precedent recognizes that "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent

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[23] As also noted, petitioner does not contend that the lands in question were not necessary to carry out the project but rather effectively concedes that they are. Therefore, all that the legislature did was take them once and for all rather than incur in a lot by lot approach. Also, petitioner has never alleged what is known as "excess condemnation." *See, e.g., City of Cincinnati v. Vester*, 281 U.S. 439 (1930)

domain is merely the means to the end." *Berman*, 348 U.S., at 33.

Yet, in this case the end—to eliminate the harmful conditions—is not in dispute. *See Petition for Panel Rehearing and/or rehearing En Banc* at 4 ("There can be no doubt that both Law 489 and the 2006 Development Plan approved pursuant thereto satisfy 'public use.'") And, as noted above, the very terms of Law 32 objectively make clear that the particular end here has not been abandoned. Neither does petitioner argue, not even in this Court, that these principal purposes were somehow abandoned by the passage of the amendment.[24] Thus, it is uncontested that the lands at issue here are destined to the type of "public use" that has been deemed acceptable by this Court for decades. Petitioner nonetheless complains that the court of appeals erred by dismissing its pretext claim on the pleadings stage.

Assuming that petitioner properly pled a pretext claim, however, the argument fails to consider that

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[24] Furthermore, although, as the First Circuit noted, petitioner did not argue that "[t]he fact that under Law 489 the land may, after improvements, be leased to private parties does not mean that Law 489 lacks a public purpose" (Pet. App. 21a, n.7), this argument would fail regardless. Specifically, the fact that under Law 32 the government may ultimately decide to transfer some parcels to individual private parties rather than to the trust—after improvements are carried out, or those lands which it understands that individual residents can improve, in harmony with the overall plan—does not render the project unconstitutional. *See Berman*, 348 U.S., at 30 ("After the real estate has been assembled, the Agency is authorized to transfer to public agencies the land to be devoted to such public purposes as streets, utilities, recreational facilities, and schools,...and to lease or sell the remainder as an entirety or in parts to a redevelopment company, individual, or partnership.")

the court of appeals determined, based on objective factors, that the principal purpose of the legislature—to eliminate conditions harmful to the public in these lands—*independently* satisfied the Public Use Clause. *See Goldstein*, 516 F.3d at 63 ("[W]e hold today that where, as here, a [taking] is justified in reference to several classic public uses whose objective basis is not in doubt, we must...reject any claims that the purported public uses are mere pretexts for an impermissible private purpose.") Put differently, where, as here, the primary purpose of the legislature is to eliminate conditions harmful to the public in a specific area, and the legislative history, and even petitioner's own pleadings, indisputably establish that this recognized public purpose remains in effect despite a re-transfer of the lands, this Court has never held that a Takings Clause claim may not be dismissed as a matter of law.

B. There Is No Conflict Among Lower Courts that Warrants this Court's Attention

Petitioner argues that the decision below conflicts with decisions of the Court of Appeals of the District of Columbia in *Franco v. National Capitol Revitalization Corp.*, 930 A.2d 160 (D.C. 2007), and the Supreme Court of Hawaii in *County of Hawai'i v. C&J Coupe Family Lt. P'ship*, 198 P.3d 615 (Haw. 2008). Petitioner specifically argues that such courts have explained "that there may be situations" where a court does not have to take at face value the legislature's public use determination so that dismissal on the pleadings stage will not be proper. *See* Pet. 18 (*quoting Franco*, 930 A.2d at 169).

Such sparse and undeveloped case law in itself strongly militates against this Court's review. Moreover, neither of those two cases hold that a complaint may not be dismissed at the pleadings stage where, as here, a plaintiff has failed to provide specific facts which would lend themselves to the plausible inference that the state action at issue is a pretext to favor particular identifiable private individuals, with no, or incidental public benefits. Indeed, the Second and Third Circuits have recognized the approach taken by the first Circuit here. *See Goldstein v. Pataki*, 516 F.3d at 60-64; *Carole Media LLC*, 550 F.3d at 311. And even the very cases cited by petitioner do not conflict with this proposition.

In *Franco* the court paid close attention to the facts alleged, and duly considered whether these were sufficient to plead a pretext claim before allowing such a claim to go forward. *See Franco*, 930 A.2d at 170-72. Mr. Franco specifically denied that the area in question there was blighted, and specifically argued that the sole objective of the condemnation was to "'design and build a new shopping center on cite for [a specific private developer's] own account." *Id.* at 171. Likewise, in *C&J Coupe*, C&J Coupe specifically argued that "the asserted public purpose was a pretext...to hide the predominantly private benefit of the Hokuli'a access road to Oceanside"—a private developer who was seeking a direct access to a private community it was developing. 198 P.3d at 644.[25] Thus, in both cases the opponent of the con-

[25] In *C&J Coupe*, moreover, the developer had entered into a development agreement with the County of Hawaii in which the county agreed that if the developer's efforts to negotiate to acquire neighboring private property for the road failed, the county would be obligated at the developer's "sole discretion" to

demnation argued that the principal purpose behind the taking was to benefit specific individuals, with no—or merely incidental—public benefits.[26]

But these cases do not stand for the proposition that when these essential factors are absent, a court may not dismiss a claim alleging a pretextual taking as a matter of law. Where, as here, a court is confronted with a statutory public use which the plaintiff admits to be constitutionally valid, and the legislature amends the statute but it is not disputed that such public use remains, there can be no doubt that the requirement of the Public Use Clause—that the actual and primary purpose behind the action be a public one—has been satisfied. Likewise, where there is not a single argument as to how the alleged action is predominantly directed to confer a private benefit upon specific individuals, a plaintiff has failed to properly plead a "pretext" claim. Under either of these scenarios there is no plausible indication that an impermissible favoritism is at stake, or that the public use requirement will not be satisfied. In any

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use its power of eminent domain to take the land, that the developer had the "sole discretion" to determine what property the county must take, and that the developer had the "sole and absolute discretion" to determine when possession of property was needed. *See C&J Coupe*, 198 P.3d at 622.

[26] Both *Franco* and *C&J Coupe*, moreover, involved instances where the condemning authorities or lower courts had rested on conclusory determinations that the "properties were 'necessary and desirable for the public use,' but did not explain why the properties were 'necessary' or to what 'public use' they would be devoted." *Franco*, 930 A.2d at 163. *See also C&J Coupe*, 198 P.3d at 647 ("[i]t is not discernible that the court based its determination of public purpose on anything more than the fact that [the] county resolution [ ] states that the proposed construction and use of the [bypass] would provide a public benefit to the county of Hawaii[.]")

event, petitioner considerably overstates the distance between those two decisions, which reflect no more than a difference in judgment as to the appropriate outcome of particular cases under settled legal standards—pleadings standards, and Public Use Clause challenges standards—which, if properly applied, can undoubtedly be used to dismiss any alleged claim of pretext as a matter of law. That is not a basis for review in this Court in Certiorari. *See* S. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States

FIDEICOMISO DE LA TIERRA DEL CAÑO MARTÍN PEÑA,
Petitioner,

v.

LUIS G. FORTUÑO, ANTONIO M. SAGARDÍA-DE JESÚS, MUNICIPALITY OF SAN JUAN, JORGE SANTINI, AUTORIDAD DE ENERGÍA ELÉCTRICA, AUTORIDAD DE CARRETERAS, ADMINISTRACIÓN DE TERRENOS,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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INTRODUCTION

Petitioner alleged and argued in the courts below that the Puerto Rican government took Petitioner's land without a legitimate public purpose. The Legislature's stated reasons for the taking are all abandoned or discredited. In litigation, Respondents' counsel concocted a variety of *post hoc* reasons for the taking, some of which Respondents repeat in their opposition. None of the purposes stated by the Legislature or advanced by Respondents in litigation, however, are consistent with Petitioner's allegation that the Mayor of San Juan has publicly announced that he will begin giving Petitioner's land to private parties as soon as possible. Nor have Respondents explained how the abrupt confiscation of the land conveyed to the Fideicomiso after an extensive planning process would serve the purposes of a statute intended "to eliminate conditions harmful to the public." Opp. 22. Petitioner has thus stated a well-pleaded claim of a taking under the mere pretext of a public purpose.

As explained in the Petition, the First Circuit's decision ordering dismissal of Petitioner's takings claim at the pleading stage conflicts with this Court's decision in *Kelo* as well as with the thoughtful decisions of the highest courts of Hawaii and the District of Columbia. The First Circuit's decision also reflects substantial confusion in the lower courts regarding the standard by which claims of pretextual takings are evaluated.

Respondents say nothing to dispel this serious conflict and confusion. Rather, they focus their

opposition on the contention that Petitioner failed to preserve its takings claim or to plead it adequately. That contention lacks merit. The need for this Court's guidance to resolve the conflict created by the First Circuit's decision and to eliminate the confusion surrounding claims of pretextual takings is thus readily apparent.

ARGUMENT

I. The First Circuit's Decision Is Inconsistent With *Kelo* As Well As With Decisions From The Highest Courts Of Hawaii And The District Of Columbia

The First Circuit ordered Petitioner's takings claim dismissed in spite of factual allegations – which are quoted and discussed in detail below, *see infra* pp. 5-9 – indicating that the taking lacked a public purpose and that the stated reasons for the taking were mere pretexts. In so doing, the First Circuit accorded dispositive weight to representations regarding the taking's purpose made by Respondents' counsel for the first time on appeal. Pet. App. 22a-23a. Under the First Circuit's decision, a defendant need only concoct a facially legitimate reason for a taking to defeat a pretext claim – even where, as here, the facts alleged by the plaintiff demonstrate that the taking is motivated by something besides a legitimate public purpose.

That decision cannot be reconciled with this Court's holding in *Kelo v. City of New London*, which made clear that the government may not take property "under the mere pretext of a public purpose." 545 U.S. 469, 478 (2005). Because the

"actual purpose" of a taking must pass scrutiny under the Public Use Clause, the bare fact that the government can present hypothetical public purposes to justify the taking does not authorize dismissal of a well-pleaded claim of pretext. *See Kelo*, 545 U.S. at 478; *City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Respondents mistakenly claim that *Kelo* is inapplicable to this case because the elimination of conditions harmful to the public – which Respondents now embrace as the purpose animating the taking – "was not even present in *Kelo*" and has been previously considered "primarily a valid prerogative of the States." Opp. 28. But nothing in *Kelo* precludes pretext claims where the stated justification for the taking has been previously deemed a 'classic' or well-established public purpose, as the Supreme Court of Hawaii has squarely held: "Plainly it was not the intention . . . of the Supreme Court in *Kelo* to foreclose the possibility of pretext arguments merely because the stated purpose is a 'classic' one." *County of Hawai'i v. C&J Coupe Family Ltd. P'ship*, 198 P.3d 615, 647 (Haw. 2008).

In addition, the "close attention" paid to the facts by the Hawaii Supreme Court in *C&J Coupe* and by the D.C. Court of Appeals in *Franco v. National Capitol Revitalization Corp.*, 930 A.2d 160 (2007), Opp. 31-32, does not resolve the conflict between those decisions and the one below. Indeed, the First Circuit departed from *Kelo* and the rulings of the Hawaii and D.C. courts precisely because – in

reliance on an incorrect interpretation of *Kelo* – it failed to give sufficient weight to the facts alleged by Petitioner in this case. To be sure, a taking "justified in reference to several classic public uses *whose objective basis is not in doubt*" will survive scrutiny under the Public Use Clause so long as it is rational. *See Goldstein v. Pataki*, 516 F.3d 50, 63 (2d Cir. 2008) (emphasis added); Opp. 30. But Petitioner's well-pleaded factual allegations raise significant doubts as to the "objective basis" for the taking of Petitioner's land. Because the First Circuit mistakenly understood *Kelo* to require it to treat the stated reasons for the taking as dispositive of the objective basis for the taking, the decision below conflicts with *Kelo*, *C&J Coupe*, and *Franco*. It is also emblematic of widespread confusion that only this Court can resolve – and, notably, Respondents make no effort to contest the Petition's description of confusion among courts and commentators concerning the correct application of *Kelo* to claims of pretext. *See* Pet. 19-21.

II. Respondents' Effort To Disguise The Conflict Created By The First Circuit's Decision Misreads The Record And Misstates The Law

In an effort to hide the conflict created by the decision below, Respondents assert that Petitioner did not actually plead allegations of pretext or argue pretext before the lower courts. Respondents also invent pleading requirements that they claim Petitioner failed to satisfy: that Petitioner allege that Law 32 abandoned the public purposes of Law 489; and that Petitioner identify the specific private parties the taking of Petitioner's land was intended

to benefit. But as Petitioner has alleged and argued pretext all along, and as neither pleading requirement posited by Respondents actually exists, the split in authority described above is squarely presented for this Court's review.

1. Respondents' contention that Petitioner never actually made any claim of pretext in the courts below is entirely without merit. Respondents concede that Petitioner alleged and argued that the threatened confiscation of Petitioner's property was not for "public use" under the Fifth Amendment's Takings Clause. *See, e.g.*, Opp. 13 ("[P]laintiff framed its public use challenge as follows: 'whether the Government can establish Law 32's compliance with the Fifth Amendment's 'public use' requirement.'"). Respondents likewise admit that the First Circuit addressed the merits of Petitioner's takings claim. *Id.* at 15.

Petitioner's allegations and arguments *specifically* raised the pretext issue. The Complaint alleged that shortly after Petitioner obtained title to approximately 200 acres of land pursuant to Law 489's comprehensive plan to address an environmental and humanitarian disaster, Pet. App. 9a-15a; Am. Comp. ¶¶ 3.1-3.5, the Puerto Rican government – now under the leadership of a different political party – enacted Law 32 in order to confiscate Petitioner's land.[1] Pet. App. 14a; Am.

[1] Notwithstanding Respondents' contrary arguments, the Fideicomiso is a private community land trust and was granted independent juridical personality by Law 489, as alleged in the Complaint. Am. Comp. ¶ 3.1. The First Circuit's decision is based on that premise.

Compl. ¶¶ 4.24-4.26. When the Legislature enacted Law 32, the Complaint explained, the Mayor of San Juan announced his intention to give away the Fideicomiso's land to private parties as soon as possible. Am. Compl. ¶¶ 3.12, 4.35.[2] Petitioner therefore alleged that the taking effected by Law 32 lacked any "discernible plan related to legitimate governmental purposes or public use," *id.* ¶ 1.4, and that Respondents' actions were prohibited by the Constitution's mandate that "takings be for legitimate public purposes, and not for the purpose of conferring a private benefit on particular parties," *id.* ¶ 5.3.

Petitioner preserved these claims of pretext in its arguments to the courts below. For instance, before the First Circuit, Petitioner relied on an extensive analysis of *Kelo* to argue that the taking lacked a legitimate purpose and that Respondents' stated purposes were unworthy of credence. Pet.'s Supp. Br. (Mar. 9, 2010); *accord* Pet. App. 20a ("The Fideicomiso says that the alleged 'taking' under Law 32 is not for 'public use' because it serves no legitimate purpose . . . .").

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[2] Evidence that Mayor Santini had already begun delivering property rightfully owned by the Fideicomiso to private parties forced Petitioner to seek emergency relief from the courts below. Pl.'s Mot. at 8, Civil No. 2009-1581 (D.P.R. June 29, 2009); Fideicomiso Mandamus Br. 2, No. 09-1911 (1st Cir. July 8, 2009); Fideicomiso Mot. at 6-7., No. 09-2569 (1st Cir. Nov. 17, 2009) (presenting evidence that Mayor Santini testified at a government hearing in October 2009 that "it was his intention to deliver 2,000 to 2,500 titles" to the land in question to individuals "starting in December, 2009 and January, 2010").

To claim that Petitioner did not present its pretext claim in the lower courts, Respondents not only disregard Petitioner's filings but also contradict their own briefs. *Compare* Opp. 23 (claiming that Petitioner "did not affirmatively allege that the amendment was, in fact, adopted to benefit a particular class of identifiable individuals" (internal quotation marks omitted)), *with* Municipality Mot. at 32 (D.P.R. July 31, 2009) ("The plaintiff specifically claims that the statute was allegedly passed for the purpose of conferring a private benefit on particular parties . . . .").

Under these circumstances, there can be no question that Petitioner has raised the takings claim presented by the Petition at every stage of this case.[3]

2. Petitioner's factual allegations state a claim of a pretextual taking sufficient to survive a motion to dismiss.

a. In enacting Law 32, the Puerto Rico Legislature set forth two official purposes for the taking of Petitioner's land: harmonizing Law 489 with other laws and clarifying that public domain lands are not transferrable. Pet. App. 23a. In their opposition, Respondents do not contend that either of these stated reasons actually motivated the taking of

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[3] There is no merit to Respondents' argument, Opp. 25-26, that Petitioner waived its right to discovery and trial by urging the Court of Appeals to invalidate the taking on appeal, Pet.'s Supp. Br. 9-10 (Mar. 9, 2010). Rather, Petitioner argued that although the district court's dismissal of the complaint had foreclosed "inquiry into improper motive" through discovery, the "limited factual record" before the Court of Appeals made "evident" the "public use violation." *Id.* at 8.

Petitioner's land. Neither do Respondents claim – as the First Circuit found in reliance on Respondents' representations at argument – that the taking was motivated by a desire to allow "experienced public agencies [to] regain ownership of lands in the canal" so as to "facilitate better and faster completion of projects." Pet. App. 23a. Instead, Respondents now claim that Law 32 and Law 489 were animated by the same (almost unintelligibly broad) purpose: "to eliminate conditions harmful to the public." Opp. 22. In other words, Respondents' current position is that the public purpose of Law 32, which took Petitioner's land, was conclusively established by the statement of motives included in Law 489, which gave Petitioner its land.

These self-serving justifications all suffer from a common flaw: each is inconsistent with Mayor Santini's announced intention to hastily distribute the Fideicomiso's land to private parties. None of the purported public purposes suggested by Respondents are rationally served by that kind of distribution of the Fideicomiso's land. *Cf. Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422 (1992) (explaining that "exercises of the condemnation power [are] constitutional" so long as the condemning authorities are "rational in their positions that some public purpose [is] served").

Respondents' inability to defend the Legislature's stated reasons for the taking, the multiplicity of *post hoc* justifications offered by Respondents' counsel, and Petitioner's factual allegations all support a plausible inference that the purposes stated by the Legislature for the taking of Petitioner's land are

mere pretext. That the reasons given by the Legislature at the time of the taking and the reasons invented by Respondents' counsel during this litigation are pretextual in turn gives rise to a strong inference that the taking lacked a legitimate public purpose. *See* Pet. 12.

b. Respondents assert that Petitioner's claim must fail because Law 489 had the public purpose of eliminating harmful conditions and Petitioner failed to argue that Law 32 abandoned that public purpose. Opp. 19-22. This contention is deeply flawed.

First, and most importantly, the issue raised by Petitioner's takings claim is not whether Law 32 "abandoned" the purpose of Law 489; rather, it is whether Law 32's taking of Petitioner's property serves a legitimate public purpose. That Law 489 – most of which was unaffected by Law 32 – still serves a public purpose is entirely irrelevant. While Respondents now say that Law 32's confiscation of the Fideicomiso's land was for the purpose of eliminating harmful conditions in the Canal area, they do not even attempt to explain how allowing Mayor Santini apparently unfettered discretion to transfer the Fideicomiso's land to private parties is consistent with that purpose.

In any event, Respondents misread the opinion below. The First Circuit recognized that Petitioner strenuously argued that Law 32's changes to Law 489 were, in fact, inconsistent with the original purposes of Law 489. Indeed, Petitioner alleged that Law 32 "also violates the basic precepts and provisions of the remainder of Law 489." Am.

Compl. ¶ 4.33. The Court of Appeals explained that Petitioner argued that the taking effected by Law 32 "bears no reasonable relationship to any possible legitimate purpose . . . not least because Law 32, in the Fideicomiso's view, relieves public agencies from the obligation to advance the goals of the ENLACE Project identified in Law 489." Pet. App. 21a; *see also* Pet.'s Supp. Br. 5-7 & n.4 (Mar. 9, 2010). Respondents' faulty "abandonment" argument is based on the exact opposite premise: that the Court of Appeals found that Petitioner "was *not* arguing that Law 32 'relieves public agencies from the obligation to advance the goals of the ENLACE Project identified in Law 489.'" Opp. 15 (quoting Pet. App. 21a) (emphasis added); *see also id.* at 20, 21-22.

c. Respondents also contend that Petitioner failed to state a claim because it failed to identify the specific individuals the taking was intended to benefit. Opp. 23-25. But Petitioner did identify the general group of individuals to whom the government planned to make a transfer. While it did not *name* these individuals, this Court's precedent cannot be read to establish such an onerous pleading requirement. In the absence of discovery, only Respondents can know precisely which private parties will benefit from the planned transfer of "the [Fideicomiso's] lands immediately and indiscriminately to private individuals." Opp. 24.

Further, while it is well established that "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*," *Kelo*, 545 U.S. at 477; *accord id.* at 494 (O'Connor, J., dissenting), this Court has never

suggested that the purpose of benefitting a specific private party through a direct property transfer is the *only* conceivable purpose that does not "pass scrutiny under the Public Use Clause." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984). There can be no doubt, for instance, that a taking could not be justified by the bare desire to exact political revenge or to harm unpopular private property owners. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 537 (1998); *id.* at 548-49 (Kennedy, J., concurring in judgment and dissenting in part). It is similarly difficult to imagine how a taking for the purpose of rewarding favored public officials with control over valuable property could possibly be classified a "legitimate purpose of government." *Midkiff*, 467 U.S. at 245.

Given that Law 32 was hastily enacted by a newly elected government, each of these impermissible non-public purposes can be plausibly inferred under the facts Petitioner alleged. Ultimately, however, what matters is that Petitioner has stated a claim that the Legislature's purpose in taking the Fideicomiso's property was not a legitimate public one. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1015 n.18 (1984).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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